DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-708
Title: First American Financial Corporation, Successor in Interest to The First American Corporation, et al., Petitioners
v.
Denise P. Edwards
Docketed: November 30, 2010
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-56536, 08-56538)
Decision Date: June 21, 2010
Rehearing Denied: August 30, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 23 2010	Petition for a writ of certiorari filed. (Response due December 30, 2010)
Dec 2 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for the petitioners.
Dec 13 2010	Order extending time to file response to petition to and including February 14, 2011.
Dec 30 2010	Brief amici curiae of American Escrow Association, et al. filed.
Dec 30 2010	Brief amici curiae of American Land Title Association, et al. filed.
Dec 30 2010	Brief amici curiae of Law Professors filed.
Jan 28 2011	Brief of respondent Denise P. Edwards in opposition filed.
Feb 9 2011	DISTRIBUTED for Conference of February 25, 2011.
Feb 9 2011	Reply of petitioners First American Financial Corporation, et al. filed. (Distributed)
Feb 28 2011	The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 19 2011	Brief amicus curiae of United States filed.
May 31 2011	Supplemental reply of petitioners First American Financial Corporation, et al. filed.
May 31 2011	DISTRIBUTED for Conference of June 16, 2011.
Jun 20 2011	Petition GRANTED limited to Question 2 presented by the petition.
Jul 11 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 13 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 22, 2011.
Jul 13 2011	The time to file respondent's brief on the merits is extended to and including October 11, 2011.
Aug 12 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.

Aug 22 2011 Joint appendix filed. (Statement of costs filed)
Aug 22 2011 Brief of petitioners First American Financial Corporation, et al. filed.
Aug 26 2011 Brief amicus curiae of Experian Information Solutions, Inc. filed.
Aug 26 2011 Brief amicus curiae of ACA International filed.
Aug 26 2011 Brief amici curiae of Pacific Legal Foundation, et al. filed.
Aug 26 2011 Brief amici curiae of DRI, et al. filed.
Aug 29 2011 Brief amici curiae of Association of Global Automakers, Inc., et al. filed.
Aug 29 2011 Brief amicus curiae of American Land Title Association filed.
Aug 29 2011 Brief amici curiae of American Bankers Association, et al. filed.
Aug 29 2011 Brief amici curiae of National Association of Home Builders and the California Building Industry Association filed.
Aug 29 2011 Brief amicus curiae of Real Estate Services Providers Council, Inc. filed.
Aug 29 2011 Brief amicus curiae of Consumer Data Industry Association filed.
Aug 29 2011 Brief amici curiae of Facebook, Inc., et al. filed.
Aug 29 2011 Brief amicus curiae of International Association of Defense Counsel filed.
Aug 29 2011 Brief amicus curiae of National Association of Retail Collection Attorneys filed.
Aug 29 2011 Brief amici curiae of Stewart Information Services Corporation, et al. filed.
Aug 29 2011 Brief amici curiae of New England Legal Foundation, et al. filed.
Sep 12 2011 SET FOR ARGUMENT ON Monday November 28, 2011.
Sep 19 2011 CIRCULATED
Sep 21 2011 Record received fro U.S.C.A. for 9th Circuit.
Oct 4 2011 Record received from U.S.D.C. for Central District of California. (4 boxes)
Oct 11 2011 Brief of respondent Denise P. Edwards filed. (Distributed)
Oct 17 2011 Brief amici curiae of Public Law Professors filed. (Distributed)
Oct 18 2011 Brief amicus curiae of the United States filed. (Distributed)
Oct 18 2011 Brief amicus curiae of Electronic Privacy Information Center filed. (Distributed)
Oct 18 2011 Brief amici curiae of Trust Law and ERISA Law Professors filed. (Distributed)
Oct 18 2011 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 18 2011 Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed. (Distributed)
Oct 18 2011 Brief amicus curiae of Toyota Economic-Loss Plaintiffs filed. (Distributed)
Oct 18 2011 Brief amici curiae of Birny Birnbaum, M.S., M.C.P., et al. filed. (Distributed)
Oct 18 2011 Brief amicus curiae of National Association of Independent Land Title Agents filed. (Distributed)
Oct 18 2011 Brief amici curiae of Reporter and Advisers to Restatement (Third) of Restitution and Unjust Enrichment filed. (Distributed)
Oct 18 2011 Brief amici curiae of Erick and Whitney Carter filed. (Distributed)
Oct 18 2011 Brief amici curiae of AARP, et al. filed. (Distributed)
Oct 18 2011 Brief amici curiae of Missouri, et al. filed. (Distributed)
Nov 7 2011 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 10 2011 Reply of petitioners First American Financial Corporation, et al. filed. (Distributed)

Nov 28 2011 Argued. For petitioners: Aaron M. Panner, Washington, D. C. For respondent: Jeffrey A. Lamken, Washington, D. C.; and Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
NOV 23 2010
OFFICE OF THE CLERK

No. __-____ 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

November 23, 2010

QUESTIONS PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2). The questions presented are:

1. Did the Ninth Circuit err in holding that a private purchaser of real estate settlement services has standing under RESPA to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided?

2. Does such a purchaser have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company state the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 5

JURISDICTION 5

STATUTORY PROVISIONS INVOLVED 5

STATEMENT 5

REASONS FOR GRANTING THE PETITION 11

I. THERE ARE CONFLICTS IN THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED 11

A. The Statutory Standing Question Under RESPA Has Divided the Circuits 11

B. The Courts of Appeals Have Reached Conflicting Decisions Regarding Whether Article III Permits Standing To Sue for a Statutory Violation That Causes No Injury to the Plaintiff 17

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS 22

A. The Ninth Circuit Misinterpreted the Statute 22

B. The Ninth Circuit's Decision Grants Standing Without Injury, in Violation of Article III 25

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION 30

CONCLUSION 33

APPENDIX:

Opinion of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 1a

Memorandum of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 8a

Order of the United States District Court for the Central District of California Denying Defendants' Motion To Dismiss, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMX) (Oct. 11, 2007, ... 12a

Order of the United States District Court for the Central District of California Denying Plaintiff's Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMX) (Dec. 10, 2007) 23a

Order of the United States District Court for the Central District of California Denying Plaintiff's Second Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMX) (June 6, 2008) 31a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (Aug. 30, 2010) 41a

Statutory Provisions Involved 42a

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*:

§ 2, 12 U.S.C. § 2601 ..... 42a

§ 8, 12 U.S.C. § 2607 ..... 43a

§ 12, 12 U.S.C. § 2610 ..... 47a

§ 16, 12 U.S.C. § 2614 ..... 47a

Class Action Complaint, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMX) (C.D. Cal. filed June 12, 2007) 48a

TABLE OF AUTHORITIES

Page

CASES

Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996), *vacated and remanded*, 524 U.S. 11 (1998) 28

Alexander v. Washington Mut., Inc., Civil Action No. 07-4426, 2008 WL 2600323 (E.D. Pa. June 30, 2008), *recon. denied*, 2008 WL 3285845 (E.D. Pa. Aug. 4, 2008) 16

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 14, 15, 16, 17, 20

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 31

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 31

Capell v. Pulte Mortgage L.L.C., Civil Action No. 07-1901, 2007 WL 3342389 (E.D. Pa. Nov. 7, 2007) 16

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 14, 15, 17, 20

Contawe v. Crescent Heights of Am., Inc., No. 04-2304, 2004 WL 2244538 (E.D. Pa. Oct. 1, 2004) 16

Crabill v. Trans Union, L.L.C., 259 F.3d 662 (7th Cir. 2001) 29

Doe v. Chao, 540 U.S. 614 (2004) 23

Doe v. National Bd. of Med. Examiners, 199 F.3d 146 (3d Cir. 1999) 21

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 31

Durr v. Intercounty Title Co.:

826 F. Supp. 259 (N.D. Ill. 1993), *aff'd*, 14 F.3d 1183 (7th Cir. 1994) 12, 31

14 F.3d 1183 (7th Cir. 1994) 2, 11, 12, 13, 14, 15

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 23

Fair Hous. Council of Suburban Philadelphia v. Main Line Times, 141 F.3d 439 (3d Cir. 1998) 20, 21

Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers, 141 F.3d 71 (3d Cir. 1998) 21

FEC v. Akins, 524 U.S. 11 (1998) 28

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 29

Gollust v. Mendell, 501 U.S. 115 (1991) 3, 23, 27

Gomez v. Wells Fargo Bank N.A., Civil No. 09-1818 (JRT/FLN), 2010 WL 3463436 (D. Minn. Aug. 30, 2010) 16

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 27

Heard v. Bonneville Billing & Collections, Nos. 99-4092 & 99-4100, 2000 WL 825721 (10th Cir. June 26, 2000) (judgment noted at 216 F.3d 1087) 19, 20

Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164 (3d Cir. 2001) 21

Kahrer v. Ameriquest Mortgage Co., 418 F. Supp. 2d 748 (W.D. Pa. 2006) 16

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 18, 20

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 25, 27, 28, 33

Moore v. Radian Group, Inc.:

233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf 2, 12, 13, 17

No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf 2, 13, 14

Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997) 16

Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) 16

Munoz v. PHH Corp., 659 F. Supp. 2d 1094 (E.D. Cal. 2009) 17

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 24

Patton v. Triad Guar. Ins. Corp., No. CV100-132 (S.D. Ga. Oct. 10, 2002) 16

Pedraza v. United Guar. Corp., 114 F. Supp. 2d 1347 (S.D. Ga. 2000) 16

Raines v. Byrd, 521 U.S. 811 (1997) 26

Robinson v. Fountainhead Title Group Corp., 447 F. Supp. 2d 478 (D. Md. 2006) 16

Smith v. United States, 502 U.S. 1017 (1991) 13

Sprint Communications Co. v. APCC Servs., Inc., 128 S. Ct. 2531 (2008) 30

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 24

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008) 31

Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) 3, 26, 32

Thorogood v. Sears, Roebuck & Co., — F.3d —, No. 10-2407, 2010 WL 4286367 (7th Cir. Nov. 2, 2010) 31

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 28, 29, 32

Warth v. Seldin, 422 U.S. 490 (1975).....20, 27

Williams v. First Am. Title Ins. Co., No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005) 17

Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590 (10th Cir. 1996).....18, 19, 20

CONSTITUTION AND STATUTES

U.S. Const.:

Art. II 32

§ 3..... 32

Art. III.....1, 2, 3, 8, 9, 17, 18, 19, 20, 21, 24, 25, 26, 29, 32

Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, tit. IV, § 461(b), 97 Stat. 1153, 1155, 1231 (1983) 25

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 18

Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* 19

15 U.S.C. § 1692k(a)(2)(A) 29

Fair Housing Act, 42 U.S.C. § 3601 *et seq.* 18, 21, 27

False Claims Act, 31 U.S.C. § 3729 *et seq.* 28

Lanham Act, 15 U.S.C. § 1051 *et seq.* 21

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* 1, 5

§ 2, 12 U.S.C. § 2601 22

§ 2(a), 12 U.S.C. § 2601(a) 22

§ 2(b)(2), 12 U.S.C. § 2601(b)(2) 22

§ 8, 12 U.S.C. § 2607 .....3, 7, 15, 22, 25

§ 8(a), 12 U.S.C. § 2607(a) 1, 7, 25, 28

§ 8(b), 12 U.S.C. § 2607(b) 12, 25

§ 8(c), 12 U.S.C. § 2607(c) 7, 25

§ 8(c)(4), 12 U.S.C. § 2607(c)(4) 25

§ 8(d)(1), 12 U.S.C. § 2607(d)(1) 23, 32

§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 1, 2, 3, 7, 11, 13, 14, 22, 23, 24, 25, 26, 30

§ 8(d)(4), 12 U.S.C. § 2607(d)(4) 23, 32

Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* 29

15 U.S.C. § 1640(a)(2)(A)..... 29

28 U.S.C. § 1254(1) 5

LEGISLATIVE MATERIALS

H.R. Rep. No. 98-123 (1983) 25

OTHER MATERIALS

Brief for Intervenor United States, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (No. 08-4334), 2009 WL 1576784 29

Hart & Wechsler's The Federal Courts and The Federal System (Richard H. Fallon, Jr. et al. eds., 6th ed. 2009) 33

Joint Appendix, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (No. 80-988)..... 27

Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993)..... 32

First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

Respondent purchased a home and, at her closing, bought title insurance from an agent of petitioner First American Title Insurance Company ("First American Title") at the state-regulated rate. Though she has no complaint about the price or quality of the title insurance or accompanying services she received, she sued – on behalf of a putative nationwide class – under the Real Estate Settlement Procedures Act of 1974 ("RESPA"). She averred that The First American Corporation ("First American Corp."), then the parent company of First American Title, had, several years earlier, invested in the title insurance agency where she purchased the insurance, Tower City Title Agency, LLC ("Tower City"). And she claimed that Tower City's alleged referral of business to First American Title therefore violated § 8(a) of RESPA, which bars "kickback[s]" – payments in exchange for referrals of settlement service business. 12 U.S.C. § 2607(a). Respondent seeks to recover, on behalf of the class, three times *all* settlement service charges (i.e., title insurance policy premiums) that each member of the class paid to title insurance agencies affiliated with First American Corp.

Petitioners moved to dismiss the case for lack of standing under RESPA and Article III of the United States Constitution. But the Ninth Circuit held that RESPA § 8(d)(2) – which provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the

person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service," 12 U.S.C. § 2607(d)(2) – gives standing to any plaintiff who purchased settlement services based on a referral that allegedly violated RESPA, whether or not the plaintiff suffered any actual harm. The Ninth Circuit further held that the existence of a remedy under RESPA – again irrespective of whether the plaintiff suffered any actual injury – suffices to establish standing to sue under Article III.

The Court should grant review and reverse.

First, the Ninth Circuit's decision deepens a conflict among the courts of appeals regarding the proper interpretation of RESPA and of Article III. The first two circuits to rule on the statutory question presented held that § 8(d)(2) authorizes recovery of *overcharges*, precluding standing for a plaintiff, like respondent, who can demonstrate no such economic harm. *See Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659),[1] *affirming* 233 F. Supp. 2d 819 (E.D. Tex. 2002); *Durr v. Intercounty Title Co.*, 14 F.3d 1183 (7th Cir. 1994). The Ninth Circuit's contrary holding that RESPA allows suits by plaintiffs who have not suffered any actual injury as a result of the alleged statutory violations is consistent with decisions of the Third and Sixth Circuits, which reached the same conclusion on that question in cases decided in 2009.

---

[1] The Fifth Circuit's opinion is available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf ("5th Cir. Op.").

As for the constitutional issue, the Ninth Circuit's holding that the existence of a (supposed) statutory remedy in § 8(d)(2) suffices to establish standing under Article III conflicts with decisions concluding that, absent an actual injury, an allegation of legal violation alone does not establish standing under Article III. That constitutional issue is an important and recurring one that this Court should resolve.

Second, the Ninth Circuit's rulings on the questions presented are erroneous. RESPA does not provide standing for uninjured private plaintiffs. Section 8(d)(2) states that any person who violates § 8 shall be liable "to the person or persons charged *for the settlement service involved in the violation* in an amount equal to three times the amount of any charge paid *for such settlement service*" – i.e., the settlement service involved in the violation. 12 U.S.C. § 2607(d)(2) (emphases added). When, as here, the conduct alleged to violate § 8 did not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged, it makes little sense to say that the settlement services were "involved in" any violation, particularly in light of the difficult constitutional issue that would be presented if the statute were read otherwise. *See Gollust v. Mendell*, 501 U.S. 115, 125 (1991).

Furthermore, the Ninth Circuit's holding that a plaintiff may sue in federal court in the absence of a cognizable "injury in fact" violates Article III. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). In the absence of any claim that the alleged statutory violation caused an actual injury to the plaintiff, standing under Article III is lacking.

Third, the questions presented are recurring issues of national importance that warrant this Court's immediate resolution. Even if nothing were at stake beyond the specific RESPA standing question, the impact of the decision below is potentially enormous: the types of arrangements that are at issue here – in which title insurers invest in title insurance agencies and enter into cooperative arrangements with them – are widespread. Many thousands if not millions of transactions have been completed by such agencies. Respondent claims (on behalf of a putative nationwide class) a right to recover hundreds of millions of dollars – an amount that (at least in respondent's case) compensates no one (for respondent admittedly has suffered no loss), but that could impose enormous costs on legitimate business and strain the federal court's limited resources.

More broadly, the standing principle that the Ninth Circuit ignored is of vital importance to maintaining the appropriate roles of the executive and judicial branches. The executive branch has authority to enforce the law; RESPA, for example, specifically grants criminal and civil enforcement authority to the executive branch. Private actions in court, by contrast, provide a remedy for injured parties. To be sure, Congress has authority to create private rights of action under federal statutes – and to expand the scope of compensable injuries – knowing that the threat of liability to private plaintiffs may deter unlawful conduct. But this Court has never allowed the claim that a plaintiff is acting as a "private attorney general" to supplant the principle that a private plaintiff who has no injury cannot sue. The Ninth Circuit's decision disregards that basic requirement.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion to dismiss for lack of standing (App. 1a-7a) is reported at 610 F.3d 514. The memorandum of the court of appeals addressing the district court's denial of respondent's motions for class certification (App. 8a-11a) is not reported (but is available at 2010 WL 2617588). The order of the district court denying petitioners' motion to dismiss (App. 12a-22a) is reported at 517 F. Supp. 2d 1199. The orders of the district court denying respondent's motions for class certification (App. 23a-30a, 31a-40a) are reported at 251 F.R.D. 449 and 251 F.R.D. 454.

JURISDICTION

The court of appeals entered judgment on June 21, 2010, and denied a petition for rehearing on August 30, 2010 (App. 41a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*, are reproduced at App. 42a-47a.

STATEMENT

A. In September 2006, respondent purchased a home in Cleveland, Ohio. App. 50a, 53a (¶¶ 6, 22). Tower City served as the title agent and conducted the closing. App. 53a (¶ 23). In connection with that transaction, respondent and her seller purchased title insurance policies issued by First American Title. App. 53a-54a (¶ 24). Respondent alleges that Tower City "referred the title insurance to First American Title." App. 54a (¶ 25). In Ohio, all title insurers charge identical premiums set by a rating

bureau and approved by state regulators. *See* App. 4a, 14a (respondent "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price").

Respondent has not alleged that she was overcharged for her title policy or that the policy or her experience with First American Title has been unsatisfactory in any way. App. 48a-59a. Respondent has never identified any difference between the policy she purchased from First American Title and policies that she could have purchased from other insurers. On the contrary, she has testified that, if she had been told that it was "going to cost [her] the same [for her title insurance] whether [she] go[es] to First American or Stewart or Commonwealth or Fidelity because they all have the same rates for title insurance," it would not have mattered to her from which company she purchased a policy.[2] She also has testified as follows:

> Q. . . . [A]s far as the work that Tower City did and the [First American title insurance] policy that it provided to you back in October of 2006, did you have any complaints about any of that?
>
> A. No.[3]

B. In June 2007, respondent filed a complaint against petitioners in federal district court in California. App. 48a-60a. Respondent alleged that, in 1998, eight years before respondent's closing, First American Corp. – then the parent corporation of First American Title – purchased 17.5% of Tower City for $2 million. App. 50a, 51a-52a (¶¶ 7-8, 12,

---

[2] Ex. A to Opp. to Mot. for Leave To File Br. *Amicus Curiae* (9th Cir. filed Mar. 24, 2009) (Edwards Depo. Tr. 38:22-39:4).

[3] *Id.* at 41:18-22.

16). She alleged that First American Corp. paid "significantly more than the book value" for its interest in Tower City. App. 52a (¶ 16). Plaintiff characterized First American Corp.'s 1998 investment in Tower City as a "kickback" for future referrals prohibited by § 8(a) of RESPA. App. 51a-52a, 58a (¶¶ 15-16, 41).[4] She pleaded a single cause of action under RESPA § 8(d)(2).[5]

In the complaint, respondent alleged that the arrangement "injured" her in only one way, "by denying [her] critical information about the cost of title insurance." App. 49a (¶ 5). (She has abandoned the claim that she was denied information about the cost of title insurance, the price of which is set at a uniform, state-regulated rate, which was disclosed to plaintiff.) She sought an injunction prohibiting the collection of premiums for title insurance referred by Tower City and other affiliated agents, as well as monetary relief in "an amount equal to three times the amount of any and all payments to title agents owned in part by First American Corporation or its subsidiaries . . . for title insurance in respect of each mortgage loan transaction." App. 58a-59a.

---

[4] Section 8(a) provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). That prohibition is subject to several statutory exemptions. *See id.* § 2607(c).

[5] Section 8(d)(2) provides that anyone who violates § 8 "shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

Respondent also sought to represent a putative class of "[a]ll consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation" and purchased "title insurance issued by First American Title Insurance Company." App. 54a (¶ 26).[6] Respondent alleged that the proposed class would consist "of thousands and perhaps tens or hundreds of thousands of individuals" and that, if the litigation proceeded as a nationwide class action, it would involve "more than a million" transactions. App. 54a, 57a (¶¶ 28, 37).

C. Petitioners moved to dismiss the complaint, contending that, because respondent had not pleaded that the RESPA violation she alleged affected the terms of the title insurance she purchased, she lacked standing under RESPA and Article III. In October 2007, the district court denied petitioners' motion to dismiss for lack of standing. App. 12a-22a. The court acknowledged that the question of standing to sue for violations of RESPA "has divided federal courts across the country." App. 15a. It held that an alleged RESPA violation was sufficient to "create [an] injur[y] that [is] the basis for standing" under RESPA and Article III, regardless of whether the violation adversely affected the plaintiff. App. 14a (internal quotations omitted).

---

[6] First American Corp. and First American Title have made investments in many other title agencies across the country. *See generally* App. 53a (¶ 21). Other underwriters have similar arrangements with title agencies; such investments are common in the industry and are well known to state insurance regulators. *See* C.A. App. 305. No court has adopted respondent's theory that such arrangements violate RESPA.

Respondent moved for certification of a nationwide class of all purchasers of title insurance from any of the 180 title agencies in which First American owned an interest. In December 2007 and June 2008, the district court entered orders denying respondent's motions for class certification and nationwide discovery. App. 23a-30a, 31a-40a.

D. In September 2008, the Ninth Circuit granted respondent permission to pursue interlocutory appeals of the district court's orders denying class certification. C.A. App. 27-28. Petitioners moved to dismiss the appeals for lack of subject matter jurisdiction, on the ground that respondent lacked standing to sue under RESPA and Article III.

In a published opinion, the Ninth Circuit rejected petitioners' threshold jurisdictional challenge to respondent's standing. The court of appeals acknowledged that a "requirement[] for Article III standing" is that the plaintiff allege an "injury." App. 4a. It also recognized that "Ohio law mandates that all title insurers charge the same price." *Id.* It stated, however, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights." *Id.* (internal quotations omitted). The Ninth Circuit indicated that respondent's Article III standing would therefore depend entirely on whether the statute "gives [her] a statutory cause of action" in the absence of any alleged overcharge. App. 7a.

Turning to that statutory question, the Ninth Circuit quoted language excerpted from several provisions of RESPA. App. 5a. Pronouncing those statutory provisions "clear" (*id.*) – and without addressing the contrary decisions of other courts or petitioners' arguments – the Ninth Circuit held that RESPA provides a cause of action for any plaintiff who pur-

chased a title insurance policy based on a referral that allegedly violated RESPA, regardless of whether that referral resulted in any harm to the plaintiff. The court declared that "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term 'any' demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.* On the basis of that analysis, the court concluded that, "[b]ecause the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III." *Id.*; *see also* App. 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants.").

The Ninth Circuit noted that the Third and Sixth Circuits had confronted the same standing issues under RESPA and had reached the same conclusions. *See id.* It did not acknowledge, however, contrary decisions from the Fifth and Seventh Circuits, although those decisions were brought to the court's attention.

In an unpublished memorandum, the Ninth Circuit affirmed in part and reversed in part the district court's orders denying respondent's motions for class certification and nationwide discovery. App. 8a-11a. It held that the district court should have certified a class of Ohio consumers for whom Tower City served as title agent. It also concluded that the court should have permitted respondent to conduct nationwide discovery to support her effort to obtain certification of a nationwide class of purchasers of title insurance

from First American Title under arrangements such as those alleged in the complaint.

Petitioners sought rehearing, which the Ninth Circuit denied on August 30, 2010. App. 41a.

REASONS FOR GRANTING THE PETITION

I. THERE ARE CONFLICTS IN THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED

A. The Statutory Standing Question Under RESPA Has Divided the Circuits

The Ninth Circuit's decision in this case deepens an existing circuit conflict on the question whether a plaintiff can establish standing to sue under RESPA merely by alleging a statutory violation, without any claim that the violation affected the settlement services rendered. The Fifth Circuit has rejected the proposition that an alleged RESPA violation alone establishes standing to sue. And the Seventh Circuit has held that § 8(d)(2) permits recovery only of an overcharge – an interpretation that precludes standing for a plaintiff such as respondent, who does not allege that she would have paid a lower premium without the alleged RESPA violation. By contrast, the Third, Sixth, and Ninth Circuits have recently held that no claim of harm is necessary for statutory standing.

1. The Fifth and Seventh Circuits each have determined that § 8(d)(2) of RESPA does not provide a right of action in the absence of concrete economic injury to the plaintiff.

In *Durr v. Intercounty Title Co.*, the plaintiff purchased a home and hired a title company to perform settlement services, including deed and mortgage recording. 14 F.3d at 1184. He then filed a putative

class action, claiming that the title company overcharged him for recording fees in violation of RESPA § 8(b). *Id.* at 1185.[7] As remedies, the plaintiff requested not only the amount of the alleged overcharge but also "full recovery of the fees" he paid. *Id.* The district court dismissed the RESPA claim because no fee-splitting was alleged, *see* 826 F. Supp. 259, 262 (N.D. Ill. 1993), and the Seventh Circuit affirmed, *see* 14 F.3d at 1187.

The district court also granted the defendant's motion to strike the prayer for relief in the complaint (seeking three times all recording fees paid). *See* 826 F. Supp. at 261. The court explained that the plaintiff had "flouted the statute's plain meaning" by asking for more than "three times the . . . total overcharge." *Id.* at 260. The Seventh Circuit affirmed, explaining that, under RESPA, "there was no basis for" claiming more than the overcharge (trebled). 14 F.3d at 1188. The court thus concluded that RESPA's private right of action does not authorize plaintiffs to seek more than the amount of any overcharge (trebled).

The Fifth Circuit followed *Durr* in *Moore v. Radian Group, Inc.* In *Moore*, the plaintiffs brought a putative class action, averring that lenders and private mortgage insurance providers engaged in an illegal kickback and referral scheme. 233 F. Supp. 2d at 819. As in this case, the plaintiffs in *Moore* sued even though the claimed scheme did not increase their settlement service costs. *Id.* at 822. The district court held that the plaintiffs lacked statutory

---

[7] Section 8(b) of RESPA prohibits the giving or acceptance of "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b).

standing to sue under RESPA because Congress did not "allow a private plaintiff to sue for an alleged violation of RESPA's anti-kickback provision when the plaintiff has not alleged that the referral arrangement increased any of the settlement charges at issue or that any portion of the charge for the settlement service was involved in the kickback violation." *Id.* at 824.

The Fifth Circuit affirmed. Agreeing with the district court's analysis, the court of appeals held that "the plaintiffs cannot establish standing simply by alleging a violation of the language of § 2607(a)." 5th Cir. Op. 13. It thus concluded that "the provisions of RESPA on which plaintiffs' claims rest cannot be said to grant persons in the plaintiffs' position the right to judicial relief that they claim." *Id.*[8]

The decision below conflicts with both *Moore* and *Durr*. The interpretation of RESPA in *Moore* would have required dismissal of plaintiff's claim here for lack of standing. Furthermore, in concluding that an allegation of a statutory violation sufficed to support standing under § 8(d)(2), the Ninth Circuit interpreted § 8(d)(2) to confer standing regardless of whether the plaintiff was overcharged for the settlement services in question. In *Durr*, however, the Seventh Circuit held that § 8(d)(2) permits plaintiffs to recover *only* an overcharge. This case therefore would have been decided differently in the Seventh Circuit, because

---

[8] That the Fifth Circuit did not publish its opinion does not diminish the need for this Court's review, especially because *Moore* followed the Seventh Circuit's published decision in *Durr*. *Cf. Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) ("An unpublished opinion may have a lingering effect in the Circuit[.]") (Blackmun, J., dissenting from denial of certiorari).

respondent has alleged no overcharge and thus would not have standing under RESPA, as interpreted in *Durr*.

2. The Ninth Circuit ignored *Moore* and *Durr*; it instead agreed with recent holdings of the Sixth and Third Circuits. App. 7a (citing *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009)).[9]

In *Carter*, as here, the plaintiffs "d[id] not allege that they were overcharged for the title insurance or settlement services" they received. 553 F.3d at 983. Even so, they filed suit under RESPA and sought to represent a class of all individuals who purchased settlement services from the same title agent and who were referred by the defendant real estate agency. *See id.* The district court held that the plaintiffs "lacked standing to bring a claim under § 2607 because they did not allege any overcharge or other concrete injury." *Id.* at 982.

The Sixth Circuit reversed. Although it failed to acknowledge the Fifth and Seventh Circuits' decisions, the court recognized that "several United States district courts have addressed this issue – and arrived at different conclusions." *Id.* at 983. Unlike the Ninth Circuit, which considered § 8(d)(2) to be "clear," App. 5a, the Sixth Circuit perceived an "arguable ambiguity" in the statutory language, 553 F.3d at 986. Consequently, it relied heavily on "legislative history" and its understanding of "[s]tatutory [p]urpose" in determining that "Congress created a

---

[9] The United States filed an *amicus* brief in support of plaintiffs in *Carter* and intervened and filed as a party in *Alston*. It did not participate in this case.

private right of action to impose damages where kickbacks and unearned fees have occurred – even where there is no overcharge." *Id.* at 987-89.

Alston was another "putative class action" of homebuyers alleging "a kickback scheme" in violation of RESPA § 8. 585 F.3d at 755. There, as here, the plaintiffs "paid the same [charges] they would have paid" even in the absence of the alleged statutory violation because the rates were filed with and approved by a state regulator. *Id.* at 757. Like the Sixth Circuit, the Third Circuit acknowledged the division of authority on the statutory question. *See id.* at 760 & n.7 (noting disagreement with *Durr*, among other cases). The Third Circuit held that "RESPA section 8 does not require plaintiffs to allege an overcharge" to be entitled to maintain an action. *Id.* at 759. Although its holding agreed with the Sixth Circuit's, the Third Circuit disagreed with that court's reliance on "statutory purpose and legislative history." *Id.* at 762 n.11.

In sum, the courts of appeals are divided on the question whether RESPA grants standing when the alleged violation does not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged. And even the courts that have reached the same (incorrect) result as the Ninth Circuit have expressed inconsistent understandings of the statutory text.

3. In circuits in which courts of appeals have not yet addressed the issue, district courts have similarly divided on whether an allegation of actual injury is necessary for standing under RESPA. Courts in the Fourth and Eleventh Circuits have reached inconsistent outcomes on the issue; district courts in North Carolina and Florida have held that standing is lack-

ing when the plaintiff cannot show that the violation resulted in an overcharge or had any other effect on the terms of the settlement services provided,[10] whereas district courts in Maryland and Georgia have reached contrary conclusions.[11] A court in the Eighth Circuit has held that a plaintiff need not show any effect on the terms of the settlement services provided to have standing to sue under RESPA.[12] Moreover, district courts in the Third Circuit had reached conflicting decisions on the issue of RESPA standing before *Alston*.[13] Most of those

---

[10] *See Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474, 480-86 (M.D.N.C. 2004) (plaintiffs claiming no "monetary injury" lacked standing under RESPA); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (because plaintiffs "have no legal right to pay anything other than the promulgated rates, they have suffered no cognizable injury by virtue of paying said rates").

[11] *See Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 488-89 (D. Md. 2006); *Patton v. Triad Guar. Ins. Corp.*, No. CV100-132, slip op. 5-6, 12 (S.D. Ga. Oct. 10, 2002); *Pedraza v. United Guar. Corp.*, 114 F. Supp. 2d 1347, 1350-51 (S.D. Ga. 2000).

[12] *See Gomez v. Wells Fargo Bank N.A.*, Civil No. 09-1818 (JRT/FLN), 2010 WL 3463436, at *5, *6 (D. Minn. Aug. 30, 2010).

[13] *Compare Contawe v. Crescent Heights of Am., Inc.*, No. 04-2304, 2004 WL 2244538, *3-*4 (E.D. Pa. Oct. 1, 2004) (no standing), *with Alexander v. Washington Mut., Inc.*, Civil Action No. 07-4426, 2008 WL 2600323, at *6 (E.D. Pa. June 30, 2008) ("failure to allege an overcharge . . . does not preclude a finding of injury in fact for the purposes of Article III [or statutory] standing"), *recon. denied*, 2008 WL 3285845 (E.D. Pa. Aug. 4, 2008); *Capell v. Pulte Mortgage L.L.C.*, Civil Action No. 07-1901, 2007 WL 3342389, at *4 (E.D. Pa. Nov. 7, 2007) (finding standing based on plaintiff's allegation "that [defendant] violated RESPA"); *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748, 756 (W.D. Pa. 2006).

opinions have acknowledged explicitly the division of authority on RESPA standing.

B. The Courts of Appeals Have Reached Conflicting Decisions Regarding Whether Article III Permits Standing To Sue for a Statutory Violation That Causes No Injury to the Plaintiff

The courts of appeals also are divided – and there is significant confusion – on the question whether an allegation of statutory violation, in the absence of any actual injury, creates standing under Article III.

1. The Ninth Circuit here held that the existence of the RESPA right of action itself supplies the necessary Article III injury in fact. *See* App. 7a. In so holding, the court below again followed the Third and Sixth Circuits' decisions in *Carter* and *Alston*.[14]

At least one other district court in the Ninth Circuit has found RESPA standing in the absence of harm. *See Munoz v. PHH Corp.*, 659 F. Supp. 2d 1094, 1101-02 (E.D. Cal. 2009). In addition to *Moore*, at least one other court in the Fifth Circuit has denied standing under RESPA where the plaintiff did not allege tangible harm. *See Williams v. First Am. Title Ins. Co.*, No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005).

[14] In *Carter*, the Sixth Circuit purported to recognize that congressional authority to confer standing to sue "is not unlimited" and that every plaintiff must establish an "injury-in-fact" or "harm." 553 F.3d at 988-89. It nonetheless held that Congress "has the authority to create a right of action whose *only* injury-in-fact involves the violation of [a] statutory right." *Id.* at 988 (emphasis added). Similarly, in *Alston*, the Third Circuit held that construing RESPA to create a cause of action "without a resultant monetary injury" did not violate Article III because receiving "a loan accompanied by a kickback or unlawful referral . . . is plainly a particularized injury" sufficient to establish standing. 585 F.3d at 762-63.

Those holdings are in conflict with decisions of the Second Circuit and of the Tenth Circuit holding that a plaintiff who has not suffered a concrete injury in fact lacks standing under Article III, even if she has alleged a statutory violation for which Congress has created a private right of action. In *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), the Second Circuit held that a retirement plan participant and purported class representative lacked constitutional standing to sue under the Employee Retirement Income Security Act of 1974 ("ERISA"), despite the allegation that the plan administrator had breached its fiduciary duty, in the absence of an alleged injury in fact distinct from the statutory violation. The plaintiff had alleged that the defendant "deprived her of her right to a plan that complies with ERISA . . . as a result of [the defendant's] breach of its fiduciary duty." *Id.* at 121. The Second Circuit rejected that argument: "While plan fiduciaries have a statutory duty to comply with ERISA," the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement." *Id.* "Kendall cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Id.*

In *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), the plaintiffs sued under the Fair Housing Act ("FHA") to challenge landlords' advertising of gender-segregated housing. The plaintiffs "did not allege the advertisements deterred them from seeking to rent the apartments";

nor did they allege "any other injury stemming from the advertisements." *Id.* at 595. The Tenth Circuit acknowledged that "[s]tanding under the [FHA] is as broad as permitted by Article III." *Id.* at 593. But it concluded that the Constitution does not permit standing to sue for "receipt by plaintiffs of the discriminatory advertisements" because such conduct "could cause only the kind of abstract stigmatic injury . . . insufficient to establish standing" under Article III. *Id.* at 596 (internal quotations omitted). The court explained that "claims of injury that are purely abstract, even if they might be understood to lead to the psychological consequence presumably produced by observation of conduct with which one disagrees, . . . do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts." *Id.* (internal quotations omitted).

The Tenth Circuit reached a similar conclusion in *Heard v. Bonneville Billing & Collections*, Nos. 99-4092 & 99-4100, 2000 WL 825721 (10th Cir. June 26, 2000) (judgment noted at 216 F.3d 1087). There, the plaintiff alleged that a debt collector violated the Fair Debt Collection Practices Act ("FDCPA") by splitting a statutory attorneys' fee with the attorney it used to pursue a collection action against the plaintiff. *See id.* at *1, *4. The plaintiff "did not allege in her complaint the attorneys' fees were too high or unconscionable or that the attorney did not do any work to justify the statutory award." *Id.* at *5. The Tenth Circuit held that the plaintiff lacked standing under Article III "to invoke the FDCPA . . . as a private attorney general" challenging the fee-splitting. *Id.* at *4. It explained that the plaintiff had not "'alleged such a personal stake in the out-

come of the controversy as to warrant [her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [her] behalf.'" *Id.* at *5 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

The Ninth Circuit's holding in this case that respondent has standing "*[b]ecause* RESPA gives [her] a statutory cause of action," App. 7a (emphasis added), cannot be reconciled with *Kendall*, *Wilson*, and *Heard*. Like respondent, the plaintiffs in each of the conflicting cases failed to show any tangible respect in which the alleged statutory violation affected them. Whereas the Second and Tenth Circuits held that the plaintiffs' failure to allege an injury resulting from the alleged statutory violation meant that they lacked standing under Article III, the Ninth Circuit ruled that Congress's creation of a remedy under RESPA alone suffices to establish standing under Article III. The two approaches to the constitutional question are irreconcilable. Nor can the Second Circuit's holding in *Kendall* or the Tenth Circuit's holdings in *Wilson* and *Heard* be squared with the Third and Sixth Circuits' decisions in *Alston* and *Carter*, both of which embraced the notion (which the Second and Tenth Circuits rejected) that a bare statutory violation suffices to confer standing under Article III.

2. The confusion in the lower federal courts on the constitutional question is further demonstrated by the fact that, despite upholding standing without injury in *Alston*, the Third Circuit has in other cases rejected the notion that merely experiencing a statutory violation suffices to establish standing. One such case, *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d

Cir. 1998) ("*FHC II*"), involved the FHA, which (as noted) prohibits the publication of discriminatory advertising and grants standing to sue to the limits to Article III. *See id.* at 440 n.1; *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998) ("*FHC I*"). The plaintiff in *FHC I* and *FHC II*, an organization opposing discrimination in housing, argued that, "because it holds the status of a private attorney general, it need show nothing more than a violation of [a statute] in order to establish Article III standing." *FHC II*, 141 F.3d at 443. The court "disagree[d]," explaining that "a violation of the Act does not automatically confer standing on any plaintiff." *Id.* at 443-44. Rather, the plaintiff must "demonstrat[e] [a] legally cognizable injury." *Id.* at 444; *see FHC I*, 141 F.3d at 78 (holding that the same plaintiff lacked standing because it failed to show that it "suffer[ed] *actual injury* as a result of the defendant's conduct") (internal quotations omitted); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs lacked standing for violations of the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus could not show the required "injury in fact"); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.").

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

A. The Ninth Circuit Misinterpreted the Statute

1. Section 8(d)(2) states that any person who violates § 8 shall be liable "to the person or persons charged for *the settlement service involved in the violation* in an amount equal to three times the amount of any charge paid for *such settlement service*," i.e., the settlement service involved in the violation. 12 U.S.C. § 2607(d)(2). Under that provision, a plaintiff has standing to sue only when she has been charged for settlement services involved in a violation of § 8. When, as here, the alleged violation of § 8 did not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged, the settlement services were not "involved in" the violation within the meaning of § 8(d)(2), and statutory standing is absent.

That reading of RESPA comports with the Act's purposes, as articulated in the statute. Congress found that consumers should be "protected from *unnecessarily high* settlement charges." *Id.* § 2601(a) (emphasis added). It accordingly stated that "[i]t is the purpose of this [Act] to effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks or referral fees *that tend to increase unnecessarily the costs* of certain settlement services." *Id.* § 2601(b)(2) (emphasis added).[15]

---

[15] Congress articulated additional purposes when it enacted RESPA. *See* 12 U.S.C. § 2601. But those purposes are addressed in other provisions of the Act and would not justify expansively interpreting § 8(d)(2) to address harmless violations of § 8.

Interpreting § 8(d)(2) to provide standing to a plaintiff who has suffered no injury, as the Ninth Circuit did here, does nothing to address "unnecessarily high" settlement charges or practices that "increase[d] unnecessarily" those charges. *Cf. Doe v. Chao*, 540 U.S. 614, 621 (2004) (rejecting construction of statute that would authorize recovery of statutory damages in the absence of actual damages as "at odds with the traditional understanding that tort recovery requires not only wrongful act plus causation . . . , but proof of some harm for which damages can reasonably be assessed"). Congress provided other enforcement mechanisms to address statutory violations that cause no injury; specifically, it provided for criminal prosecutions and authorized civil-enforcement proceedings by federal and state regulators, all without requiring a showing of harm to any private party. *See* 12 U.S.C. § 2607(d)(1), (4).

To the extent there is any ambiguity in § 8(d)(2), it should not be interpreted to authorize standing to sue absent an injury in fact, because that interpretation would raise grave concerns regarding the provision's constitutionality as applied to plaintiffs such as respondent. *See Gollust*, 501 U.S. at 125 (rejecting statutory interpretation that would raise "serious constitutional doubt whether [the] plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

plainly contrary to the intent of Congress."); *infra* Part II.B.[16]

2. The Ninth Circuit did not address petitioners' arguments regarding the interpretation of the statute. Instead, it began its analysis by quoting the text of § 8(d)(2) and italicizing the phrase "any charge paid" in the final clause of that provision, which states that a defendant is liable "in an amount equal to three times the amount of any charge paid for such settlement service." App. 5a (quoting 12 U.S.C. § 2607(d)(2)). It then stated that "[t]he use of the term 'any'" in the final clause of § 8(d)(2) "demonstrates that" the "charges" for which a defendant is liable under § 8(d)(2) "are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.* Based on that understanding of the measure of damages under RESPA, the court concluded that RESPA "gives Plaintiff a statutory cause of action" regardless of whether she has been "overcharged." App. 7a.

The Ninth Circuit's statutory construction is incorrect because the court erroneously looked to the *measure of damages* recoverable in a private action under RESPA to determine who has standing to sue. Even if a plaintiff *who has standing* under RESPA may recover three times the charge she paid, that does not answer the question what must be shown to establish statutory standing. Standing under § 8(d)(2) is available only when the plaintiff was

---

[16] There is no barrier to considering statutory standing before Article III standing. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) ("statutory standing . . . may properly be treated before Article III standing"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998).

charged for settlement services "involved in [a] violation" of § 8, and the Ninth Circuit offered no explanation of how that requirement could be met when the alleged violation had no effect on the charge for, or other terms of, the settlement service transaction.[17]

B. The Ninth Circuit's Decision Grants Standing Without Injury, in Violation of Article III

The Ninth Circuit's decision conflicts with this Court's decisions on constitutional standing because it authorizes suit in federal court in the absence of a cognizable "injury in fact," in violation of Article III.

1. This Court's cases "have established that the irreducible constitutional minimum of standing contains three elements," the first of which is "an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations, citations, and footnote omitted).

---

[17] The legislative history on which the Ninth Circuit relied, *see* App. 5a-7a, does not support its interpretation. The 1983 amendments to § 8(c) did not prohibit "controlled business arrangements," as the Ninth Circuit suggested, but rather *exempted* them from § 8(a)-(b). *See* Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, tit. IV, § 461(b), 97 Stat. 1153, 1155, 1231 (1983); H.R. Rep. No. 98-123, at 75 (1983) (explaining that the "Committee bill amends" RESPA "to clarify that controlled business arrangements . . . are a permissible method of doing business so long as" certain requirements are met); *see also* 12 U.S.C. § 2607(c)(4) (current provision). Further, nothing in the legislative history suggests that the amendments regarding controlled business arrangements had any relation to the changes in the wording of § 8(d)(2), as the Ninth Circuit also implied.

Respondent's claim of standing founders on that injury-in-fact requirement. She has not alleged that she was overcharged for her title policy or that the policy or her experience with First American Title has been unsatisfactory in any way. Nor has she alleged that she would have been better off had she purchased a policy from a different insurer or that the identity of the insurer mattered to her. There is no claim here that any alleged violation of RESPA operated to her detriment. Without any allegation of an actual injury to herself, respondent cannot establish standing under Article III. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 818 (1997) (members of Congress lacked standing to challenge constitutionality of legislation, despite having statutory authority to sue, because they failed to show a "personal injury") (internal quotations and emphasis omitted).

2. The Ninth Circuit held that the supposed existence of the treble damages *remedy* in § 8(d)(2) suffices to create standing to sue under Article III, regardless of whether the plaintiff suffered any distinct and concrete injury. But Congress cannot create a statutory remedy and authorize private actions in federal court to obtain that remedy in the absence of a showing of injury. As this Court explained in *Raines*, "[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." 521 U.S. at 820 n.3. "Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 129 S. Ct. at 1151. Thus, "[a]lthough Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules,

Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Gollust*, 501 U.S. at 126 (internal quotations and citation omitted); *see also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("a direct and necessary consequence of the case and controversy limitations found in Article III" is that there is "an outer limit to the power of Congress to confer rights of action").

As the Ninth Circuit noted (*see* App. 4a), Congress does have authority to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" – such as "an individual's personal interest in living in a racially integrated community" or "injury to a company's interest in marketing its product free from competition." *Lujan*, 504 U.S. at 578; *see also Warth*, 422 U.S. at 500 (dictum). *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), illustrates the principle. There, a landlord falsely told the plaintiff, an African-American woman, that no apartment was available for her to rent, in violation of the FHA, which "establishe[d] an enforceable right to truthful information concerning the availability of housing." *Id.* at 373. The plaintiff alleged that, as a consequence of that violation, she "suffered 'specific injury,'" *id.* at 374, and she sought $1,000 in "actual damages," Joint Appendix at 20, *Havens Realty Corp. v. Coleman*, *supra* (No. 80-988). On those facts, the Court held that "the Art. III requirement of injury in fact is satisfied." *Havens*, 455 U.S. at 374. *Havens* shows that Congress can create a private right of action based on the invasion of a statutory right *when that*

invasion causes actual injury.[18] The plaintiff in this case, however, neither alleged nor suffered such "legally cognizable injur[y]" (*Lujan*, 504 U.S. at 578).

The Ninth Circuit suggested that the mere possibility of recovery of damages was sufficient to create standing, but this Court has rejected the notion that a plaintiff's interest in receiving a "bounty" – such as three times her title insurance premium – suffices to create standing. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). In *Vermont Agency*, the Court explained that the False Claims Act's provision granting a successful *qui tam* relator a portion of the government's recovery in the litigation "is insufficient to give [the relator] standing." *Id.*[19] An interest "that is merely

---

[18] Similarly, in *FEC v. Akins*, 524 U.S. 11 (1998), the plaintiffs claimed that being deprived of information about the membership, contributions, and expenditures of the American Israel Public Affairs Committee ("AIPAC") that they asserted federal law required AIPAC to disclose harmed them by hindering their ability "to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id.* at 21. The Court concluded that "the informational injury at issue [there], directly related to voting, the most basic of political rights, [was] sufficiently concrete and specific." *Id.* at 24-25; *see also Akins v. FEC*, 101 F.3d 731, 737 (D.C. Cir. 1996) (en banc) ("If a party is denied information that will help it in making a transaction – and a vote can be thought of as a kind of transaction – that party is obviously injured in fact."), *vacated on other grounds and remanded*, 524 U.S. 11 (1998). Respondent does not claim that she had any right to information under § 8(a) (which is not about disclosure); in any event, respondent cannot claim that she was deprived of information that would have affected her choice of title insurer or the terms of the insurance she obtained.

[19] The Court went on to hold that the False Claims Act "can reasonably be regarded as effecting a partial assignment of the

a byproduct of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773 (internal quotations omitted).[20]

It is no answer to the Article III objection to argue that "plaintiffs in a RESPA section 8 case who allege that their settlement was tainted by unlawful kickbacks have sufficient injury for standing purposes." Brief for Intervenor United States at 26, *Alston v. Countrywide Fin. Corp.*, *supra* (No. 08-4334), 2009 WL 1576784. That assertion would render the "Cases" or "Controversies" requirement mere wordplay. A plaintiff can always allege an interest in avoiding the "taint" of unlawful behavior in connection with her activities. Unless such behavior causes actual injury distinct from the mere fact of the violation, a plaintiff may not sue.

Government's damages claim" to the plaintiff, which partial assignment was an "adequate basis for the relator's suit for his bounty" because "the United States' injury in fact suffices to confer standing on" the relator. *Vermont Agency*, 529 U.S. at 773-74; *see also id.* at 777-78. (Here, of course, there is no claim that RESPA effects any sort of assignment of an injured party's claim to respondent.)

[20] Thus, under *Vermont Agency*, a plaintiff has standing to sue for statutory damages, such as are available under the FDCPA, 15 U.S.C. § 1692k(a)(2)(A), and the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A), only when she has suffered an injury in fact. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) (holding that "a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit" has standing to seek civil penalties payable to the government); *cf. also Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665-66 (7th Cir. 2001) (Posner, J.) (suggesting that a plaintiff has standing under Article III to pursue statutory damages only in the circumstances recognized in *Friends of the Earth* and *Vermont Agency*).

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

The Ninth Circuit's holdings in this case raise issues of great practical importance and constitutional significance meriting this Court's intervention.[21]

A. The Ninth Circuit's interpretation of § 8(d)(2) threatens petitioners with enormous liability, despite the absence of any claim that their conduct has caused harm to respondent. As noted, respondent seeks to recover on behalf of a class of many tens of thousands of individuals. Respondent's complaint alleges that, in less than a year and a half, First American Title entered into "*more than a million*" transactions like the one she challenges here. App. 57a (¶ 37) (emphasis added). If, as respondent argues, all of those class members are entitled to recover three times the title insurance premiums they paid to First American Title, the threatened liability would be enormous.

This statutory issue has arisen, and is likely to recur, with frequency. The types of arrangements that are at issue here – in which title insurers invest in title insurance agencies – are widespread. Moreover, the sheer volume of reported decisions on RESPA standing (*see supra* Part I.A), including three circuit court decisions in the last two years, demonstrates that these questions are arising with increasing frequency.

---

[21] Because the petition presents a threshold, dispositive question of plaintiff's standing, the interlocutory posture of this case is no reason to deny review. *See, e.g., Sprint Communications Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2534-35 (2008) (reviewing interlocutory decision on standing).

The Ninth Circuit's ruling will encourage the filing of class actions such as this one that impose extraordinary costs – including the costs associated with *in terrorem* settlement value and the discovery process. Such litigation would not compensate any victim because, by definition, there is no injured plaintiff. This Court repeatedly has warned against the dangers of uncontrolled litigation threatening massive liability. *See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies") (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (same); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (same); *see also Thorogood v. Sears, Roebuck & Co.*, — F.3d —, No. 10-2407, 2010 WL 4286367, at *6-*7 (7th Cir. Nov. 2, 2010) (Posner, J.) (detailing abuses to which the class-action device is subject); *Durr*, 826 F. Supp. at 264 (observing that there is "no *public* benefit in converting RESPA into some type of Attorneys' Relief Act where the public weal is really not being served at all").

B. The implications of the Ninth Circuit's holdings for standing jurisprudence are equally profound. Under the principle adopted in this case, there is no constitutional barrier to an uninjured plaintiff availing herself of a statutory remedy. That would afford Congress unfettered power to confer standing in private litigation, would impermissibly expand the limits of federal-court jurisdiction, and would render meaningless this Court's admonition that "the require-

ment of injury in fact . . . cannot be removed by statute." *Summers*, 129 S. Ct. at 1151.

The Ninth Circuit's decision also undermines the separation-of-powers principles animating the constitutional standing requirement. The executive branch has authority to enforce the law – without establishing standing – and Congress granted both federal and state regulators enforcement authority under RESPA. *See* U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); 12 U.S.C. § 2607(d)(1), (4). Notwithstanding the frequent invocation of the notion of a "private attorney general," the Constitution does not grant standing to private individuals who – despite having suffered no individual harm from a violation of the law – stand to recover a bounty if they win their lawsuit. *See Vermont Agency*, 529 U.S. at 772-73; *see also* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793, 1821-22 (1993) (arguing that considerations of political accountability, implicit in Article II, forbid congressional licensing of private attorneys general when the plaintiff has not suffered "individuated injury"). The bedrock "Cases" or "Controversies" requirement in Article III means that the doors to the courthouse are open to private civil claimants only when a plaintiff is seeking to "obtain[] compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73.

As noted above, this does not mean that Congress cannot create a private right of action based on the invasion of purely statutory rights *when the invasion of those rights causes actual injury*. "[I]n creating legal rights the invasion of which will create standing,"

however, "Congress' power is solely one of 'elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Hart & Wechsler's The Federal Courts and The Federal System* 144 (Richard H. Fallon, Jr. et al. eds., 6th ed. 2009) (quoting *Lujan*, 504 U.S. at 578). Because respondent here suffered no such concrete, de facto injury, she lacks standing to maintain her suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

November 23, 2010

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 1a

Memorandum of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 8a

Order of the United States District Court for the Central District of California Denying Defendants' Motion To Dismiss, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (Oct. 11, 2007) 12a

Order of the United States District Court for the Central District of California Denying Plaintiff's Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (Dec. 10, 2007) 23a

Order of the United States District Court for the Central District of California Denying Plaintiff's Second Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (June 6, 2008) 31a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (Aug. 30, 2010) 41a

Statutory Provisions Involved 42a

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*:

§ 2, 12 U.S.C. § 2601 ..... 42a

§ 8, 12 U.S.C. § 2607 ..... 43a

§ 12, 12 U.S.C. § 2610 ..... 47a

§ 16, 12 U.S.C. § 2614 ..... 47a

Class Action Complaint, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed June 12, 2007) 48a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California.
S. James Otero, District Judge, Presiding.
D.C. No. CV-07-03796-SJO-FFM

Argued and Submitted Feb. 4, 2010

Filed June 21, 2010

Before: B. FLETCHER, HARRY PREGERSON, and SUSAN P. GRABER, Circuit Judges.

GRABER, Circuit Judge:

Plaintiff Denise P. Edwards filed a complaint against Defendants The First American Corporation ("First American") and its wholly owned subsidiary, First American Title Insurance Company ("First American Title") (collectively, "Defendants"). The complaint alleged a violation of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607. According to Plaintiff, First American

improperly paid millions of dollars to individual title companies and in exchange those title companies entered into exclusive referral agreements with First American. Plaintiff moved for class certification, and certain discovery, which the district court denied. Plaintiff's appeal from those rulings is addressed separately in a memorandum disposition filed this date. At the same time as Plaintiff filed her motions, Defendants moved to dismiss the complaint for lack of standing. The district court denied the motion, and Defendants brought this appeal. We have jurisdiction pursuant to 28 U.S.C. § 1292(b). *See also* 28 U.S.C. § 1292(e); Fed.R.Civ.P. 23(f). For the reasons that follow, we affirm.

First American is a publicly traded holding company that owns, in addition to First American Title, several other companies in the field of real estate-related information services. First American Title is a title insurance underwriter that issues title insurance policies to real estate owners and lenders in 47 states and the District of Columbia. Defendants assert that First American has an ownership interest in a small proportion of the thousands of title insurance agencies that are authorized to sell First American Title policies. Plaintiff contends that, in exchange for First American's purchase of a minority interest, many of these title agencies enter into "exclusive" agency agreements with First American Title, pursuant to which the agencies agreed to sell First American Title's title insurance policies generally. Defendants assert that few First American Title "exclusive" agency agreements are completely exclusive. Plaintiff claims that these agreements are actually exclusive and thus illegal under the anti-kickback provisions of RESPA.

According to Plaintiff's allegations, she was affected by one such exclusive agency agreement between First American and Tower City. In 1998, First American paid Tower City $2 million in cash and securities. According to Plaintiff's allegations, in exchange, First American received a 17.5% minority interest in Tower City, and Tower City entered into a "Captive Title Insurance Agreement" that required it to refer all future title insurance business "exclusively" to First American Title. Plaintiff further alleges that Tower City had agreements with and regularly referred business to at least three other title insurers prior to 1998, but then began referring customers exclusively to First American after they entered into the Captive Title Insurance Agreement.

Plaintiff, a resident of Cleveland, Ohio, bought a home in Cleveland in September 2006. Tower City was the settlement agent and conducted the closing at its office in Highland Heights, Ohio. At or before settlement, Plaintiff received a "HUD-1 Settlement Statement" showing, on line 1108, that she would pay $455.43 and the seller would pay $273.42 for title insurance. Plaintiff claims that her title insurance was referred to First American pursuant to an exclusive agency agreement, which Plaintiff alleges was illegal under RESPA.

Plaintiff filed a complaint in district court. Defendants responded by filing a motion to dismiss for lack of subject matter jurisdiction. Specifically, Defendants claimed that Plaintiff lacked both Article III standing and statutory standing under RESPA. The district court denied Defendants' motion, holding that RESPA gave Plaintiff certain rights, the violation of which conferred standing. We review de novo.

Mortensen v. County of Sacramento, 368 F.3d 1082, 1086 (9th Cir. 2004).

There are three requirements for Article III standing – injury, causation, and redressability. *Fulfillment Servs. Inc. v. UPS*, 528 F.3d 614, 618 (9th Cir. 2008). The parties disagree about the injury component only. Defendants argue that Plaintiff has not suffered a concrete injury in fact because she has not alleged that the charge for title insurance was higher than it would have been without the exclusivity agreement. Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price. Ohio Rev.Code Ann. §§ 3935.04, 3935.07 (West 2010). Nonetheless, Plaintiff counters that the damages provision in RESPA gives rise to a statutory cause of action whether or not an overcharge occurred. We agree with Plaintiff.

"The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Fulfillment Servs.*, 528 F.3d at 618-19 (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500, 95 S.Ct. 2197. Thus, we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III.

It is well settled in this court that "statutory interpretation begins with the plain language of the statute." *United States v. Chaney*, 581 F.3d 1123, 1126 (9th Cir. 2009) (brackets and internal quotation

marks omitted). "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (brackets and internal quotation marks omitted).

RESPA prohibits the payment of "any fee, kickback, or thing of value" in exchange for business referrals and also forbids that a "portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service" be paid for services that are not actually rendered to the customer. 12 U.S.C. § 2607(a), (b). Whenever a violation of these prohibitions occurs, the statute provides that the defendants are liable to the "person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of *any charge paid* for such settlement service." *Id.* § 2607(d)(2) (emphasis added).

These RESPA provisions are clear. A person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term "any" demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service. Further, the term "overcharge" does not exist anywhere within the text of the statute.

Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III. The legislative history of RESPA supports our holding. As first enacted in 1974,

RESPA entitled purchasers to damages "in an amount equal to three times the value or amount of the fee or thing of value" that changed hands. Pub.L. No. 93-533, § 8(D)(2), 88 Stat. 1724 (1974) (amended 1983). This provision failed to account for "controlled business arrangements" like the alleged agreement between Tower City and First American Title, whereby an entity could provide a referral *without* the direct payment of a referral fee. A 1982 House Committee Report noted that these practices could result in harm beyond an increase in the cost of settlement services:

> [T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his associates have a financial interest in the company being recommended. [Because the settlement industry] almost exclusively rel[ies] on referrals . . . the growth of controlled business arrangements effectively reduce[s] the kind of healthy competition generated by independent settlement service providers.

H.R.Rep. No. 97-532, at 52 (1982).

Acting on this concern, Congress exempted controlled business arrangements from liability only in limited circumstances, 12 U.S.C. § 2607(c)(4), and eliminated the "thing of value" phrasing in the damages provision, replacing it with "any charge paid" for the settlement service, *id.* § 2607(d)(2). Calculating the penalty with reference to the entire amount of the settlement service appears to address instances in which no direct referral fee has been paid. Indeed, these no-fee situations were the impetus behind Congress' enactment of the 1983 amendment. *See*

H.R.Rep. No. 98-123, at 77 (1983) (expecting that RESPA violators "involved in controlled business arrangements . . . shall be . . . liable . . . in the amount of three times the amount of the charge paid for the settlement service").

Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants. Our holding places us in agreement with two of our sister circuits. In *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009), the Sixth Circuit held that a plaintiff has standing to sue a settlement service provider under RESPA, even if that plaintiff was not overcharged for settlement services. The court came to that conclusion after looking at the text of RESPA and then examining its legislative history and the overall intent of RESPA. *Id.* at 986-88. The Third Circuit held similarly in *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 755 (3d Cir. 2009), stating that Congress created a private right of action without requiring an overcharge allegation.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

Appeals from the United States District Court
for the Central District of California.
S. James Otero, District Judge, Presiding.
D.C. No. CV-07-03796-SJO-FFM

Argued and Submitted Feb. 4, 2010
Pasadena, California

Filed June 21, 2010

MEMORANDUM*

Before: B. FLETCHER, HARRY PREGERSON, and SUSAN P. GRABER, Circuit Judges.

Plaintiff Denise P. Edwards appeals with respect to the denials of her two motions for class certification and her motion for nationwide discovery in her suit

---

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

against Defendants The First American Corporation and its wholly owned subsidiary, First American Title Insurance Company (collectively, "Defendants"). The complaint alleged a national scheme by which Defendants paid millions of dollars to individual title companies and received written exclusive referral agreements in return. In an opinion filed this date, we addressed Defendants' motion to dismiss. Here, we address Plaintiff's appeal.

We review for abuse of discretion the district court's determination of class certification. *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). We also review for abuse of discretion whether or not discovery is permitted in a class action. *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975).

1. The district court did not abuse its discretion in denying the nationwide class. The party seeking certification bears the burden of showing that each of the four requirements of Federal Rule of Civil Procedure 23(a) and at least one requirement of Rule 23(b) have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). Plaintiff failed to meet that burden on the present record.

2. The district court abused its discretion in denying nationwide discovery. Plaintiff must be given "an opportunity to present evidence as to whether a class action [is] maintainable," and such an opportunity requires "enough discovery to obtain the material." *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977). We hold that Plaintiff should be allowed to conduct nationwide discovery and, following that discovery, Plaintiff may renew her motion for certification of a nationwide class.

3. The district court abused its discretion in denying the Tower City (Ohio) class. With respect to liability, there is a single, overwhelming common question of fact: whether the arrangement between Tower City and First American violated the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607 ("RESPA"). The district court erred when it held that individualized issues predominated because individualized proof would be necessary to determine whether Tower City had referred each class member to First American Title, who was in the class, and what damages each class member suffered. The second two factors clearly do not defeat class certification; every class action requires identification of class members, and most require individual proof of loss. *See Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010) ("[T]he amount of damages is invariably an individual question and does not defeat class action treatment." (internal quotation marks omitted)).

To show that a "referral" was made by Tower City would not require a great amount of individualized proof. A "referral" is "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of" title insurance. 24 C.F.R. 3500.14(f). Plaintiffs contend that Tower City was contractually obligated to refer customers to First American Title, which, if true, would be common proof of the "action" element of a referral.

The reliance or causation element requires a more individualized determination, but when misrepresentations are made to a class of similarly situated individuals, the requirement that the Plaintiff prove reliance or causation will not, by itself, defeat class

certification. *See* Fed.R.Civ.P. 23(b)(3) advisory committee's note ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action . . . [unless] there [is] material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."). Evidence submitted by Plaintiff demonstrates that title agents, in this case Tower City, rather than purchasers, choose which title insurance underwriter to use. Indeed, RESPA was motivated by the fact that "reverse competition" is widespread in the title insurance market. In support of their contention that title agents do not always pick the title insurance underwriter, Defendants point to an affidavit stating that, "[f]rom time to time," banks and other lenders involved in a real estate purchase, not the title agent, pick the title insurance underwriter. This statement is plainly insufficient to show that class members are not similarly situated.

Because individualized questions of law and fact do not predominate, the district court's denial of Plaintiff's motion to certify the Tower City class was an abuse of discretion.

AFFIRMED in part; REVERSED in part and RE-MANDED. The parties shall bear their own costs on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

[Filed Oct. 11, 2007]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS [Docket No. 29]

S. JAMES OTERO, District Judge.

This matter is before the Court on Defendants First American Corporation ("First American") and First American Title Insurance Corporation's ("First American Title") Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim, filed August 7, 2007. Plaintiff Denise Edwards ("Edwards") filed an Opposition, to which Defendants replied. Pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, the Court found this matter suitable for disposition without oral argument and vacated the hearing set for September 4, 2007.

I. *BACKGROUND*

Plaintiff Denise Edwards purchased a home, choosing Tower City Title Agency, LLC as her settlement

agent to conduct the closing. Edwards and the seller sought to purchase insurance, and Tower City referred them to First American Title. Edwards alleges that Defendants have formed agreements with various title agencies such as Tower City in which Defendants paid large sums of money in exchange for exclusive referral arrangements that funnel all of the title agencies' business to Defendants.

Edwards brings suit on behalf of all consumers who purchased title insurance through a title agency subject to an exclusive referral agreement with First American Title under the Real Estate Settlement Procedures Act ("RESPA"), a statute that aims to "eliminat[e] kickbacks and referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).[1]

II. *DISCUSSION*

Defendants move to dismiss, arguing that (1) Edwards lacks standing, (2) her claim is barred by the statute of limitations, and (3) her allegations do not state a valid claim.

A. *Edwards Has Standing to Pursue a RESPA Claim.*

The constitutional requirements of standing are well-known: a plaintiff must demonstrate an injury (2) traceable to the defendant's actions that (3) can be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). "[S]tanding is an aspect of subject matter jurisdiction . . . ." *Fleck & Assocs. v. City of Phoenix*, 471 F.3d 1100, 1107 n. 4 (9th Cir. 2006).

---

[1] Unless otherwise indicated, all section numbers refer to Title 12 of the United States Code.

Upon determining that subject matter jurisdiction is lacking, the Court must dismiss the action. Fed.R.Civ.P. 12(hX3) [*sic*]. Because a motion to dismiss for lack of standing is a motion to dismiss for lack of subject matter jurisdiction, the Court must accept all allegations of fact in the complaint as true and construe them in the light most favorable to Plaintiffs. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

Defendants argue that Edwards lacks standing because she has not suffered an injury. (Mot.6-10.) Edwards admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price, but contends that under RESPA she is entitled to damages in the amount of three times the total she paid for that insurance.

Although Defendants are correct that Congress cannot abrogate, override, or change the constitutional standing requirements (Mot.8), "Congress retains broad authority to create injuries that are the basis for standing." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3.1 (4th ed. 2003). The question before the Court becomes: In passing RESPA, what injury did Congress create?

The answer to this question turns on statutory analysis of the RESPA damages provision, an analysis that has divided federal courts across the country.

1. *The RESPA Damages Provision*

Under RESPA, a person who gives or accepts a "thing of value" pursuant to an agreement that real estate settlement service business "shall be referred to any person" is liable to the "persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any

charge paid for such settlement service." §§ 2607(a), (d)(2).

The parties (and federal courts) disagree on how to interpret the damages language.[2]

2. *Past Judicial Interpretation of the RESPA Damages Provision*

The first courts to address this issue limited damages to three times any overcharge that resulted from the referral. *Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183 (7th Cir. 1994). Accordingly, plaintiffs that did not suffer an overcharge had no injury and no standing. *See, e.g., Morales v. Attorneys' Title Ins. Fund*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997); *see also Moore v. Radian Group*, 233 F. Supp. 2d 819, 824 (E.D. Tex. 2002).

More recently, federal district courts have found that these early cases were wrongly decided, concluding that the earlier cases did not properly interpret the 1983 amendment to RESPA. *See, e.g., Kahrer v. Ameriquest Mortg. Co.*, 418 F. Supp. 2d 748, 754 (W.D. Pa. 2005) (criticizing *Durr* for concluding, without discussion, that the plain meaning of the statute required an overcharge). Among other provisions, Congress changed the calculation of RESPA damages from three times "the value or amount of

---

[2] *Compare Carter v. Welles-Bowen Realty, Inc.*, 493 F. Supp. 2d 921 (N.D. Ohio 2007) (finding an overcharge necessary for standing), *Williams v. First Am. Title Ins. Co.*, 2005 WL 2219460 (N.D. Miss. 2005) (same), and *Contawe v. Crescent Heights of Am., Inc.*, 2004 WL 2244538 (E.D. Pa. Oct. 1, 2004) (same), *with Yates v. All Am. Abstract Co.*, 487 F. Supp. 2d 579, 582 (E.D. Pa. 2007) (finding standing without an overcharge), *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006) (same), and *Patton v. Triad Guar. Ins. Corp.*, No. CV 100-132 (S.D. Ga. Oct. 10, 2002) (same).

the fee or thing of value" to cover "any charge paid for such settlement service." *Id.*

Just this May, an Ohio district court disagreed with the *Kahrer* line of cases, determining that the 1983 amendment's language was not sufficiently clear to evince congressional intent to overhaul the calculation of RESPA damages. *Carter v. Welles-Bowen Realty, Inc.*, 493 F. Supp. 2d 921, 927 (N.D. Ohio 2007).

3. *This Court's Analysis*

The starting point for interpretation of any statute "is always its language." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (identifying the "one, cardinal canon" of statutory construction a court should turn to first before all others).

Here, the plain language of the statute favors a finding that damages are not limited to overcharges: violators are liable for "any charge paid" for settlement service "involved in" a violation of RESPA. When "the words of a statute are unambiguous," *id.* at 254, 112 S.Ct. 1146, the "judicial inquiry is complete," *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).

Recently, the court in *Carter v. Welles-Bowen Realty, Inc.* found ambiguity in the use of the word "any." 493 F. Supp. 2d at 927. The court determined that if Congress intended to expand liability it would have used the word "all," as it did in a subsequent RESPA section. *Id.* However, the Court agrees with *Kahrer* that "trebling any charge paid . . . is more indicative

of an intent to include all charges rather than merely [an] overpayment." 418 F. Supp. 2d at 754 ("[I]t is simply nonsensical to suggest that Congress still intended to provide for damages in an amount three times the proscribed payment when it eliminated that very language from the statute."). Even so, the Court turns to other evidence in concluding that there is no distinction between "any" and "all."

The legislative history behind RESPA, another "traditional tool" of statutory construction, *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 602, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004), supports Edwards' position that an overcharge is not necessary for standing. As first enacted in 1974, RESPA based its damages calculation on the amount of the referral fee, kickback, or other thing of value. Pub. L. No. 93-533 § 8(D)(2), 88 Stat. 1724 (1974) (prior to 1983 amendment). This provision failed to account for "controlled business arrangements" similar to the alleged agreement between Tower City and First American Title, whereby an entity could provide a referral without the direct payment of a referral fee. A 1982 House Committee Report noted that these practices could result in harm beyond an increase in the cost of settlement services:

> [T]he advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referrer or his associates have a financial interest in the company being recommended. [Because the settlement service industry] almost exclusively rel[ies] on referrals . . . the growth of controlled business arrangements effectively reduce the kind of healthy

> competition generated by independent settlement service providers.

H.R. Rep. No. 97-532, at 52 (1982).

Based on this concern, Congress exempted controlled business arrangements from liability only in limited circumstances, § 2607(c)(4), and eliminated the "thing of value" language in the damages provision, replacing it with "any charge paid" for the settlement service, § 2607(d)(2). "[C]alculating the penalty based on the entire amount of the settlement service appears to address situations where no direct referral fee has been paid." *Kahrer*, 418 F. Supp. 2d at 755. Indeed, these fee-less situations were the moving force behind Congress' 1983 amendment. *See, e.g.*, H.R. Rep. No. 98-123, at 75 (1983) (expecting that RESPA violators "involved in controlled business arrangements . . . shall be . . . liable . . . in the amount of three times the amount of the charge paid for the settlement service").

Also persuasive is a Department of Housing and Urban Development ("HUD") regulation clarifying that acts that do not create a consumer overcharge can still violate RESPA. *See* 24 C.F.R. § 3500.14(g)(2) ("[The presence of an overcharge] is irrelevant in determining whether the act is prohibited."). Although this regulation is unrelated to the issue of damages under RESPA, it supports Edwards' proposition that Congress intended to create a broad right to be free from settlement services premised upon referral agreements.[3]

---

[3] Defendants do not argue that any overcharge-free referral is exempt from RESPA, only that these referrals are property pursued by the government under § 2607(d)(4) which authorizes the Secretary of HUD, state attorneys general, and state insur-

Edwards need not have suffered an overcharge to invoke the protection of RESPA. By its 1983 amendment, Congress created a right to be free from referral-tainted settlement services as demonstrated by both the statute's text and legislative history. If Edwards can prove her claim, there is a statutory injury fairly traceable to Defendants' action and redressable by a favorable decision. Accordingly, this Court has subject matter jurisdiction over the case.

B. *Motion to Dismiss for Failure to State a Claim*

Federal Rule of Civil Procedure 12(b)(6) governs motions to dismiss for failure to state a claim upon which relief can be granted. A complaint must allege enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Dismissal is proper under Rule 12(b)(6) only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1988). The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Defendants claim that Edwards' Complaint does not state a claim under RESPA for two reasons: First, her claim is barred by the statute of limitations. Second, Defendants' alleged actions, even if true, do not violate RESPA.

---

ance commissioners to request injunctive relief under RESPA. (Reply 3.)

1. *Edwards' Claim is Not Time-Barred.*

The statute of limitations for private plaintiffs suing under RESPA is one year from the "date of the occurrence of the violation." § 2614. Defendants ask the Court to find that any violation, if it exists, was triggered in 1998, when First American allegedly paid $2 million to Tower City in exchange for an exclusive referral agreement. (Mot 10.) Defendants' request would lead to an absurd result. Two conspirators could form an exclusive referral agreement, but delay the referrals for one year, escaping all liability and allowing those companies to "break the law with impunity." (Opp'n 16.)

Rather, Congress has provided a right to be free from referral-tainted settlement services. As in *Snow v. First American Title Insurance Co.*, the "ill occurs, if at all, when the plaintiff pays for the [tainted] service, typically at the closing. Plaintiffs could have therefore sued at that moment, and the standard [is] that the limitations period commences when the plaintiff has a complete and present cause of action." 332 F.3d 356, 359-60 (5th Cir. 2003). Edwards' Complaint – filed within one year of paying for the allegedly tainted service – is timely.

2. *Edwards' Allegations State a Claim Under RESPA.*

Defendants further assert that Edwards' claim cannot succeed because no referral took place as Tower City and First American Title do not provide "distinct services," *see* 24 C.F.R §§ 3500.2, .14(f)(2), and First American had no duty to disclose its ownership interest in Tower City. (Mot.12-13.)

Defendants have violated RESPA if "(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral

actually occurs." *Culpepper v. Inland Mortg. Corp.*, 132 F.3d 692, 696 (11th Cir. 1998).

Here, Edwards alleges that Defendants paid large sums of money to individual title agencies in exchange for exclusive referral arrangements that funnel all of the agencies' business to Defendants. (Opp'n 1.) For example, in 1998, First American overpaid for a minority interest in Tower City. (Compl. ¶ 15.) By overpaying, First American provided Tower City with a thing of value. In exchange for this "thing of value," Tower City allegedly stopped referring its title 17 insurance business to the other underwriters with which it had long dealt, and began referring virtually all of its title insurance business to First American Title. (Compl. ¶ 20.) Should Edwards' allegations prove true, then both an agreement to refer settlement business and actual referrals were present, meeting Culpepper's requirements.

Defendants' argument that no referral took place rests upon facts outside of Edwards' Complaint and is better suited for argument in a motion for summary judgment. Finally, § 2607(c) provides a safe harbor only for entities operating under an affiliated business arrangement that discloses the existence of that arrangement to customers. Because Edwards alleges that she was not notified of any arrangement between First American and Tower City (Compl. ¶ 3), her claim survives.

III. *RULING*

Because injury under RESPA is not limited to an overcharge and Edwards' Complaint states a claim upon which relief can be granted, Defendants' Motion to Dismiss is DENIED.

Defendants must answer Edwards' Complaint on or before October 31, 2007.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

[Filed Dec. 10, 2007]

ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [Docket No. 42]

This matter is before the Court on Plaintiff Denise Edwards' Motion for Class Certification, filed September 25, 2007. Defendants First American Title Insurance Company ("FATIC") and The First American Corporation ("First American") filed an Opposition, to which Edwards replied. Pursuant to Federal Rule of Civil Procedure 78 and Local Rule 7-15, the Court found this matter suitable for disposition without oral argument and vacated the hearing set for November 5, 2007. Because Edwards' proposed class is not certifiable under Rule 23(b), her Motion is DENIED without prejudice.

I. BACKGROUND

Edwards purchased a home in Ohio. Her title agency, Tower City Title Agency, LLC ("Tower City"),

referred her to FATIC – a wholly-owned subsidiary of First American – for title insurance. (Edwards Decl. ¶ 3.) Edwards believes this referral was unlawful under the Real Estate Settlement Procedures Act ("RESPA"), which prohibits the exchange of "a thing of value" for title insurance referrals. 12 U.S.C. § 2607. Specifically, Edwards claims that First American purchased 17.5% of Tower City at an inflated price; in exchange, Tower City agreed to refer all future Ohio title insurance business "exclusively" to FATIC. (Compl. ¶¶ 15-16.)

Further, Edwards alleges that Defendants have perpetrated this scheme in a uniform manner across the United States by purchasing a stake in more than 100 title agencies at inflated prices in exchange for exclusive referrals. (Compl. ¶¶ 3, 21.) Edwards seeks to bring class action on behalf of all customers referred to FATIC by a title agency partially owned by First American.

Now, Edwards moves for class certification.

II. DISCUSSION

The party moving for class certification bears the burden of showing that class action satisfies the four well-known requirements of Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality, and adequacy – as well as one of the three requirements of Rule 23(b). *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001).

Edwards seeks certification of the following nationwide class: All consumers who (on or after June 12, 2006) entered into federally related mortgage loan transactions using the services of a title agency (or similar entity) owned in part by First American (or its subsidiaries) in which the HUD-1 Settlement Statement (or other document in the loan file)

includes a charge or payment for title insurance issued by FATIC. (Mot. 2.) Excluded from the class are Defendants' current and former executives. (Mot. 2.)

Edwards contends that this class may be certified under Rule 23(b)(1)(A), (b)(2), or (b)(3).

A. Class Action Is Not Appropriate Under Rule 23(b)(1)(A).

Rule 23(b)(1)(A) permits class action if "separate actions would create a risk of varying adjudications 'which would establish incompatible standards of conduct for the party opposing the class.'" *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (quoting Fed. R. Civ. P. 23(b)(1)(A)). The purpose of this rule is "primarily to prevent a defendant from being caught in a classic 'Catch 22' situation where one court orders a defendant to take certain action which another court orders the same defendant not to take." *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 131-32 (E.D. Pa. 1973), *vacated on other grounds*, 561 F.2d 434 (3d Cir. 1977). Accordingly, the "incompatible standards of conduct" language must be interpreted to mean that separate judgments in separate actions could impose requirements on the defendants that are impossible to simultaneously fulfill. *McDonnell Douglas*, 523 F.2d at 1086 (citing *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973)).

Edwards seeks to permanently restrain Defendants from charging and collecting fees for title insurance referred by all title agencies owned in part by First American. (Compl. Prayer for Relief ¶ C.) Because there is no danger that another court will order First American to affirmatively charge and collect the fees

Edwards' injunction would prohibit, certification under Rule 23(b)(1)(A) is inappropriate.

Edwards contends that should separate plaintiffs bring separate lawsuits, the result could be conflicting outcomes: one court could enjoin a referral agreement as unlawful, while another court could uphold the agreement as lawful. (Mot. 13.) Yet, this argument – that the same legal question could be decided differently by different courts – has been rejected by the Ninth Circuit. *See, e.g., McDonnell Douglas,* ("[Although] separate actions could reach . . . inconsistent resolutions of the same question of law [and] might establish 'incompatible standards of conduct' in the sense of different legal rules governing the same conduct[,] subdivision (b)(1)(A) was not intended to permit class actions simply when separate actions would raise the same question of law.").

Edwards' proposed class cannot be certified under Rule 23(b)(1)(A).

B. Class Action Is Not Appropriate Under Rule 23(b)(2).

Rule 23(b)(2) permits class action if the defendant has acted in a manner applicable to the class generally, making injunctive or declaratory relief appropriate with respect to the class as a whole. "In order to permit certification under [Rule 23(b)(2)], [any] claim for monetary damages must be secondary to the primary claim for injunctive or declaratory relief." *Molski v. Gleich,* 318 F.3d 937, 947 (9th Cir. 2004); *see also* Fed. R. Civ. P. 23(b)(2) advisory committee note (1966) ("The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.").

Here, Edwards' claim is primarily for money damages. Although she seeks injunctive relief, monetary

damages are the "essential goal" of the litigation. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 860 (9th Cir. 2001) ("[I]f Plaintiffs succeed in obtaining a significant award of monetary damages, they will likely accomplish . . . their essential goal [even] without . . . an injunction."). Further, an injunction has little value to the class when compared to the potentially enormous amount of damages at stake.[1] *See Linney v. Cellular Alaska P'ship*, 151 F.3d at 1240. Finally, if monetary recovery were not available, Edwards would be unlikely to bring suit to obtain solely injunctive relief. *See Molski*, 318 F.3d at 950 n.1537.

Edwards' proposed class cannot be certified under Rule 23(b)(2).

C. Class Action Is Not Appropriate Under Rule 23(b)(3).

Rule 23(b)(3) permits class action if (1) common questions of law predominate over individual questions and (2) class action is the superior method of adjudication. "Where, after adjudication of the classwide issues, [the] plaintiffs must still introduce a great deal of individualized proof to argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004).

---

[1] Edwards' potential damages alone exceed $1000. (Compl. ¶¶ 23-25.) Edwards seeks class damages on behalf of 1000 other customers of Tower City, as well as the customers of 180 other title agencies. If Edwards and Tower City represent the average customer and title agency, class damages surpass $180 million.

Here, common questions do not predominate. Edwards has proposed a class that includes any consumer referred to FATIC by 180 different title agencies. (Wawersich Decl. ¶¶ 14-18.) She alleges that referrals made by these title agencies are unlawful because each title agency received a "thing of value" when First American overpaid that title agency for an ownership interest. Edwards contends that all 180 transactions were executed through agreements that were identical in at least one respect: "title agents were paid to direct their title insurance to [FATIC]." (Mot. 15.) Even if this were true, the question remains whether this payment was a "thing of value." Edwards' theory of liability requires that First American's payment was greater than what it received in return, an ownership interest in the title agency. To recover for the class, Edwards would have to scrutinize all 180 transactions by which First American obtained a stake in a title agency (of which, 179 are irrelevant to Edwards' individual claim) to show that First American overpaid.

Edwards' proposed class cannot be certified under Rule 23(b)(3).

D. Limited Class Certification Discovery Is Appropriate.

"Mindful of the [Local Rule 23-3] deadline for filing a class certification motion" (Mot. 19), Edwards served Defendants with interrogatories and document requests and noticed depositions more than a month before the deadline. (Gordon Decl. Exs. 9-10.) Defendants refused to respond to this discovery. (Gordon Decl. Exs. 9-10.) Edwards requests an opportunity to engage in class certification discovery. (Mot. 19 ("If this Court determines that the Requirements of Rule 23 have not been met at this time, it

should permit [Edwards] to undertake class-related discovery.").)

"[U]nder some circumstances[,] the failure to grant discovery before denying class treatment is reversible error." *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977). "In determining whether to grant discovery the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for the determination." *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975).

Discovery will not produce evidence that a class involving 180 title agencies is certifiable. Edwards hopes to find 180 identical agreements that require referrals. (Mot. 19-20.) As discussed above, this will not eliminate the Court's concern that individual issues predominate. Further, discovery regarding 180 title agencies would require extensive time and cost, with little probability of resolving the individual factual issues that prevent Rule 23(b)(3) certification.

However, discovery may yield evidence that a smaller class consisting of all consumers referred to FATIC by Tower City is certifiable. Defendants argue in passing that a Tower City class could not be certified, but the issue was not sufficiently briefed for the Court to conclude that discovery would be futile. Discovery narrowly aimed at this smaller class would significantly decrease the time and cost of discovery. Although there are potential obstacles to certification – particularly, individual questions of fact and law – discovery could resolve these issues.

III. RULING

Because certification of Edwards' proposed class is not appropriate under Rule 23(b), her Motion for Class Certification is DENIED without prejudice.

Edwards must file her second motion for class certification on or before **February 25, 2008**. Discovery on the issue of class certification must be completed by **February 11, 2008**.

IT IS SO ORDERED.

December 10, 2007

/s/ S. JAMES OTERO
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMX)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

[Filed June 6, 2008]

ORDER DENYING PLAINTIFF'S SECOND MOTION FOR CLASS CERTIFICATION
[Docket No. 99]

This matter is before the Court on Plaintiff Denise P. Edwards' Motion for Certification of a Tower City Class, filed April 21, 2008. Defendants First American Title Insurance Company ("FATIC") and The First American Corporation ("First American") filed an Opposition, to which Edwards replied. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for May 19, 2008. *See* Fed. R. Civ. P. 78(b). Because the proposed class is not maintainable under Federal Rule of Civil Procedure 23(b)(3), Edwards' Motion is DENIED.

I. BACKGROUND

Edwards purchased a home in Ohio. Her title agency, Tower City Title Agency, LLC ("Tower City"), referred her to FATIC – a wholly-owned subsidiary of First American – for title insurance. (Compl. ¶¶ 20, 25.) Edwards believes this referral was unlawful under the Real Estate Settlement Procedures Act ("RESPA"), which prohibits the exchange of "a thing of value" for title insurance referrals. 12 U.S.C. § 2607. Specifically, Edwards claims that First American purchased 17.5% of Tower City at an inflated price; in exchange, Tower City agreed to refer all future Ohio title insurance business "exclusively" to FATIC. (Compl. ¶¶ 15-16.) Further, Edwards alleges that First American purchased a minority interest in numerous title agencies at an inflated price in exchange for exclusive referrals. (Compl. ¶¶ 3, 21.)

Originally, Edwards moved to certify a class of customers referred to FATIC by any of the nearly 200 title agencies partially owned by First American. (Order of Dec. 10, 2007, at 2.) This Court found that this class was not maintainable under any provision of Rule 23(b). However, the Court also found that "discovery may yield evidence that a smaller class consisting of all consumers referred to FATIC by Tower City is certifiable" and granted Edwards leave to file a second motion for certification limited to this smaller class (Order of Dec. 10, 2007, at 5-6).

Now, Edwards moves for certification of a class limited to consumers referred to FATIC by Tower City (the "Tower City Class").

II. DISCUSSION

Edwards defines the Tower City Class as follows: All consumers who (1) on or after June 12, 2006 (2) entered into federally related mortgage loan

transactions (3) using Tower City (4) in which a loan document in the loan file included a charge for title insurance issued by FATIC. (Mot. 1-2.) Defendants' current and former executives are excluded from the class. (Mot. 1.)

Rule 23 establishes two sets of requirements for class certification. First, every proposed class action must satisfy the four prerequisites of Rule 23(a). Second, the parties seeking class certification must show that the proposed class is maintainable under Rule 23(b)(1), (2), or (3). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

A. The Tower City Class Meets the Requirements of Rule 23(a).

Edwards's proposed class must satisfy the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy. Defendants argue that the proposed class cannot be certified because Edwards is neither a typical class member nor an adequate representative.[1]

1. Edwards Is a Typical Class Member.

The "claims or defenses of the class representative must be typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The claims of the class representative need not be identical to the claims of other class members, but the class representative "must be part of the class and possess the same interest and suffer the same injury as the class

---

[1] Defendants concede that the Tower City Class, which includes hundreds of members, is sufficiently numerous, *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (presuming numerosity for a class with more than 40 members), and meets the relatively "permissive" commonality threshold, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998).

members." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (internal quotation marks omitted).

Defendants argue that Edwards is not typical of three subsets of the Tower City Class: (1) class members who purchased title insurance after November 9, 2006; (2) class members who purchased title insurance for property in states other than Ohio; and (3) class members who suffered an overcharge because of the alleged referral.

Yet, Defendants fail to explain why any of these distinctions between Edwards and a segment of the Tower City Class affects Edwards' and the class member's interests or injuries. For example, Defendants contend that some class members may have suffered a distinct injury by overpaying for their title insurance. Yet, this has no effect on the damages calculation, which compensates for the statutory injury created by RESPA. (*See* Order of Oct. 11, 2007, at 5.)

Edwards is a typical member of the Tower City Class. Like other class members, she was allegedly referred to FATIC from Tower City and could be entitled to three times the amount she paid for title insurance. Edwards has similar interests and injuries as the other class members and she is a member of the class. Although the method by which Edwards was referred to FATIC may differ from some class members, this does not make Edwards less typical.[2]

---

[2] Defendants other two arguments high-light facts Edwards would have to prove at trial for the class. First, the parties agree that the agreement governing Edwards' referral was amended on November 9, 2006 so that Tower City no longer referred customers exclusively to FATIC. Edwards believes this amendment was a sham calculated to avoid legal liability. To recover for a large part of the class, Edwards would have to

Accordingly, Edwards is a typical class member.

2. Edwards Is an Adequate Class Representative.

The person representing the class must "fairly and adequately . . . protect the interests" of all members of the class. Fed. R. Civ. P. 23(a)(4). The representation is adequate if the attorney representing the class is qualified and competent, and the class representatives are not disqualified by interests antagonistic to the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Defendants claim Edwards is an inadequate class representative because she allegedly "knows next to nothing about the litigation." (Opp'n 9.) For example, Edwards could not identify the types of motions filed in her case, although she believes that motions have been filed. (Edwards Dep. 66.) Yet, the Ninth Circuit places little importance on the named plaintiff's own legal knowledge and experience. *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) ("The record indicates clearly that [the class representative] understands his duties and is currently willing and able to perform them."). The more important considerations are that the plaintiff's counsel provides representation that protects the

---

prove her sham theory, even though this theory is irrelevant to her own claim.

Second, the parties agree that homes located in Ohio are subject to a different agreement than homes located outside Ohio (*compare* Jones Decl. Ex. B, *with* Jones Decl. Ex. F). The parties' dispute as to whether the non-Ohio agreement requires exclusive referrals is yet another issue for Edwards to prove at trial unrelated to her claim.

class interests and the plaintiff understands her duties. *Id.*

Here, Defendants do not question the qualifications and competency of Edwards' counsel. In addition, Edwards' deposition testimony reveals that she sufficiently understands the litigation. Edwards met with her attorneys eleven times to discuss the case, reviewed the complaint prior to filing, and understands the basic theory of the case. (Edwards Dep. 55-56, 61, 66.) Moreover, Edwards understands that she "represent[s] other people . . . ." (Edwards Dep. 23.) "The Rule does not require more." *Las Vegas Sands*, 244 F.3d at 1162.

Accordingly, Edwards is an adequate class representative.

B. The Tower City Class Is Not Maintainable Under Rule 23(b).

Edwards must also show that class action is maintainable under any of three provisions of Rule 23(b). *See Amchem Prods.*, 521 U.S. at 623. Edwards contends that this class may be certified under Rule 23(b)(3), which authorizes certification if: (1) common questions of fact or law predominate over individual issues; and (2) class action is superior to other methods of adjudication. Defendants contend that significant individual issues of fact preclude a finding of predominance and superiority.

1. Common Questions of Law or Fact Do Not Predominate.

Predominance is determined not by counting the number of common issues, but by weighing their significance. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir. 1999). "Where, after adjudication of the classwide issues, plaintiffs must

still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004).

Here, class action would require "a great deal of individualized proof." *See id.*[3]

a. Class Action Would Require Individualized Inquiries to Determine if a Referral Occurred.

To obtain damages under RESPA, a class member must have been "referred" to FATIC by Tower City. *See* 12 U.S.C. § 2607(a). The definition of the term "referral" introduces a significant individualized issue. A referral is "any oral or written action directed to a person *which has the effect of affirmatively influencing* the selection by any person of a provider of a settlement service." 24 C.F.R. § 3500.14(f)(1) (emphasis added); *see Gardner v. First Am. Title Ins. Co.*, No. 00-2176, 2003 U.S. Dist. LEXIS 1815, at *21 (D. Minn. Jan. 27, 2003) (defining "referral"). Consequently, class action would require proof at trial concerning each class member and whether that class member was affirmatively influenced by Tower City's actions. This proof would involve direct- and cross-examination of each class member. *See Gardner*, at *21 ("[T]he Court would have to individually adjudicate whether the use of Defendants['] title services in

---

[3] While Defendants' challenges to Edwards' typicality present individualized facts not common to the class (*see supra* note 2), these individualized facts can be eliminated by excising from the Tower City Class any consumers who: (1) purchased insurance from FATIC after November 9, 2006; or (2) purchased insurance for property outside of Ohio.

each of the . . . transactions at issue was, in fact, 'affirmatively influenced' . . . .").[4]

This proof is highly individualized.

b. Class Action Would Require Individualized Identification of Class Members and Determination of Damages.

Two other significant individual issues are identification of the class members and the determination of damages. Should Edwards succeed on her RESPA claim, Defendants are liable for damages to "the person or persons charged for the settlement service." 12 U.S.C. § 2607. Edwards does not contest Defendants' assertion that determining who was charged for each insurance transaction would require individualized proof, instead declaring the claim "a non-issue." Rhetoric aside, Edwards proposes no basis for easily adjudicating that proof.

"[A]nyone who paid for title insurance is a class member, regardless of who is insured by the policy." (Reply 4 (citing *Cohen v. Chi. Title Ins. Co.*, 242 F.R.D. 295, 300 (E.D. Pa. 2007).) Yet, there appears to be no simple or common basis for determining who paid and how much. Edwards provides evidence solely on a transactional basis. For each real estate transaction insured by FATIC for which Tower City provided settlement services, Edwards introduces

---

[4] In addition, a referral may not be unlawful if the relationship between FATIC and Tower City was disclosed to the class member. Tower City argues that each potential class member "should have received a privacy policy that described the affiliation . . . ." (Opp'n 14-15.) Even if, at trial, this policy is proven to be uniform and provide sufficient disclosure, then individualized proof of receipt (or non-receipt) becomes relevant. This proof is also highly individualized.

documents that identify the buyer and seller of the real estate and how much title insurance cost.

However, these documents do not identify who paid for that insurance. In Ohio, the buyer and seller determine who pays for title insurance based on individualized negotiations that vary in terms. (Jones Decl. ¶ 15 (providing evidence based on Jones' 25 years of experience in the title insurance business in Ohio).) The buyer may bear the whole cost, the seller may bear the whole cost, or the buyer and seller may share the cost based on individualized negotiations. Edwards, for example, did not pay the whole premium for either the owner's or lender's policy; by negotiation, the seller paid 37.5% of the premium. (Compl. ¶ 24.)

Significant individualized proof would be required merely to prove membership in the class. If this Court certified the Tower City Class, the parties would have to hale into court all of the buyers and sellers (who likely reside in Ohio) to identify who paid for title insurance. In addition, the buyer and seller may disagree as to who paid how much, requiring the jury to make hundreds of credibility determinations.

Accordingly, common issues do not predominate.

2. Class Action Is Not Superior.

Even if "there is a common nucleus of fact regarding a defendant's conduct," class action is not superior when "each class member has to litigate numerous and substantial issues to establish his or her right to recover individually . . . ." *Zinser v. Accufix Research Inst. Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). Because of the numerous individual issues identified in Part II.B.1 of this Order, each class member would

have to conduct substantial litigation in addition to the common questions presented by Edwards' claim.[5]

Accordingly, class action is not superior.

III. RULING

Because the proposed class is not maintainable under Rule 23(b)(3), Edwards' Motion for Certification of a Tower City Class is DENIED.

IT IS SO ORDERED.

Dated this 6th day of June, 2008.

/s/ S. JAMES OTERO
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

---

[5] Defendants also argue that class action is not superior because: (1) attorney fees give incentive to bring suit despite relatively small damages; and (2) private enforcement of RESPA is unnecessary given the government's ability to enforce RESPA. While these statutory considerations weigh slightly against superiority, they are not necessary to this Court's conclusion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

D.C. No. CV-07-03796-SJO-FFM
Central District of California, Los Angeles

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION;
FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

[Filed Aug. 30, 2010]

ORDER

Before: B. FLETCHER, PREGERSON, and GRABER, Circuit Judges.

"Appellant's Limited Motion for Clarification, Correction and/or Panel Rehearing" is DENIED.

The panel has voted to deny Appellees' petition for panel rehearing. Judges Pregerson and Graber have voted to deny Appellees' petition for rehearing en banc, and Judge Fletcher has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellees' petition for panel rehearing and petition for rehearing en banc are DENIED.

STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601, provides:

§ 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

2. Section 8 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607, provides:

§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of

the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone,[1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use

---

[1] So in original. The comma probably should not appear.

any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

3. Section 12 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2610, provides:

§ 2610. Prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements

No fee shall be imposed or charge made upon any other person (as a part of settlement costs or otherwise) by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a mobile home), or by a servicer (as the term is defined under section 2605(i) of this title), for or on account of the preparation and submission by such lender or servicer of the statement or statements required (in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C. 1601 § et seq.].

4. Section 16 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2614, provides:

§ 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

[Counsel Names/Addresses Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

[Filed June 12, 2007]

CLASS ACTION COMPLAINT

PLAINTIFF Denise P. Edwards on behalf of herself and a class of all others similarly situated alleges as follows:

INTRODUCTION

1. This is a class action by consumers seeking relief from the predatory practices of a title insurer that violate the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601 *et seq.* ("RESPA").

2. Plaintiffs seek redress for defendants' wholesale, purposeful violations of RESPA. That statute flatly prohibits both giving and accepting any "thing of value" in return for referrals of title insurance

business. Congress enacted RESPA in 1974 to ensure consumers were "protected from unnecessarily high settlement charges" that resulted from "abusive practices" such as "kickbacks and referral fees" used by title insurers and others.

3. Defendants First American Title Insurance and The First American Corporation are among the largest title insurance underwriters in the United States and its corporate parent. They rely largely on title agents to obtain business. Despite the law's prohibitions, they have embarked on a nationwide policy aimed at enlarging their market share by paying large sums of money to individual title agencies (in at least one case, $2 million or more) in exchange for exclusive referral agreements which funnel all of the companies' business to defendants, and are not disclosed to consumers. Defendants have thus created undisclosed "Captive Title Insurance Arrangements," which are prohibited by RESPA precisely because of their potential for harm to consumers.

4. Plaintiffs are a class of consumers who purchased title insurance through a title agency (a) owned, in part, by First American and (b) operated under an exclusive agency agreement.

5. Defendants' exclusive (and secret) referral agreements have thus injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated – to quote Congress's words from 1974 – "to increase unnecessarily the costs" of title insurance. Plaintiffs therefore request appropriate relief, including the fees illegally received by Defendants, trebled in accordance with federal law.

PARTIES

The Named Plaintiff

6. Denise P. Edwards is a resident of Ohio, and is employed by United Cerebral Palsy. Ms. Edwards purchased her home at 1136 East 170th Street, Cleveland, OH 44110, on or about September 29, 2006.

The Defendants

7. The First American Corporation ("First American") is a California corporation, with its principal office in Santa Ana, California. First American Corporation operates across the country in approximately 2,100 offices, employing nearly 35,000 people. First American owns a number of subsidiaries, including co-Defendant First American Title Insurance Company.

8. First American Title Insurance Company ("First American Title") is also a California corporation, wholly-owned by First American Corporation, also with its principal place of business in Santa Ana, California. First American Title issues title insurance policies directly and through agents across the country.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under RESPA pursuant to 28 U.S.C. § 1331.

10. This Court has personal jurisdiction over Defendants because each Defendant systematically and continually does business within the judicial district, and the principal place of business for each Defendant is within the judicial district.

11. Venue is appropriate in this Court because all Defendants reside in this judicial district. 28 U.S.C. §§ 1391(b) and (c).

GENERAL FACTUAL ALLEGATIONS

12. At all times relevant to this Complaint, First American Title has been in the business of issuing title insurance, and has been a wholly-owned subsidiary of First American Corporation.

13. First American Title obtains a substantial portion of its title insurance business through referrals from title agents.

14. It is the standard and typical practice of title agents to refer their clients to a title insurance issuer with respect to the settlement of real estate transactions. Accordingly, at all times relevant to this Complaint, First American Corporation and First American Title had in place a program to identify and contract with title agencies to act as exclusive referring agents to First American Title.

15. In 1998, for example, First American Corporation paid a kickback to Tower City Title Agency, LLC in Cleveland, Ohio ("Tower City") in order to obtain an agency agreement providing that Tower City would exclusively refer all title insurance underwriting to First American Title. This Captive Title Insurance Arrangement was designed to secure increased market share of title insurance business for First American Title by paying the owners of Tower City additional monies to refer title insurance underwriting exclusively to First American Title.

16. In order to give the kickback the appearance of legitimacy, First American Corporation agreed to "purchase" a 17.5% minority interest in Tower City.

The purchase price for the minority interest, $2 million ($500,000 in cash, and First American Corporation stock then valued at $1.5 million) was significantly more than the book value of Tower City. First American made the payment without any significant investigation into the value of Tower City. Subsequently, in 2004, First American made an additional cash payment of $804,825 to Tower City.

17. Although First American Corporation became, on paper, a 17.5% minority owner in Tower City in 1998, neither Tower City, First American Corporation, nor First American Title ever disclosed the nature of their business relationship to consumers using the services of Tower City with respect to mortgage loan transactions. Instead, Tower City referred insurance underwriting exclusively to First American Title and deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market.

18. Moreover, although ostensibly a part owner in Tower City, First American Corporation has received only nominal profit distributions from Tower City. Indeed, the other owners of Tower City have simply used Tower City's operating account to pay personal expenses, such as private school tuitions, medical bills and other personal items, thereby reducing or eliminating what would have been profits to First American Corporation without any objection from First American Corporation.

19. As further evidence that First American's plan was simply to pay a kickback, First American does not exercise its right to appoint one member to the Tower City board of directors, nor does it review Tower City's annual financials.

20. As part of the "purchase agreement," Tower City was required to enter into an exclusive agency agreement with First American Corporation's wholly-owned subsidiary, First American Title. Prior to the kickback from First American Corporation, Tower City referred substantial title insurance business to other title insurance underwriters such as Stewart Title Guaranty Company, Old Republic National Title Insurance Company, and United General Title Insurance Company. Since the kickback, Tower City has referred virtually all of its title insurance business to First American Title.

21. Upon information and belief, First American's Captive Title Insurance Arrangement with Tower City has been repeated in similar fashion through the "purchase" of ownership interests in dozens of other title agencies throughout the country. According to First American's most recent 10-K, in 2006 alone First American bought equity interests in eleven companies and purchased the minority interests remaining in four companies already included in the company's consolidated financials. Also in 2006, First American made 34 additional acquisitions in the title insurance industry.

FACTS APPLICABLE TO NAMED PLAINTIFF

22. On or about September 29, 2006, Ms. Edwards settled on the purchase of her home at 1136 East 170th Street, Cleveland, Ohio 44110.

23. Tower City Title Agency, LLC was the settlement agent and conducted the closing at its office located at 6151 Wilson Mills Road in Highland Heights, Ohio.

24. Lines 1109 and 1110 of the HUD-1 Settlement Statement show premiums for title insurance, both

lender's and owner's coverage, totaling $728.85. Ms. Edwards paid $455.43 of the premium and the seller, Mark Watson, paid the remaining $273.42, as shown on Line 1108 of the HUD-1.

25. Pursuant to the Captive Title Insurance Arrangement, Tower City Title Agency, LLC referred the title insurance to First American Title, which issued both the lender and owner policies.

CLASS ACTION ALLEGATIONS

26. The named Plaintiff brings this action on behalf of herself and all other similarly situated individuals pursuant to *Fed. R. Civ. P.* 23. The class of victims consists of:

> All consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation, or its subsidiaries, in which the HUD-1 Settlement Statement, or other document in the loan file, includes a charge or payment, for title insurance issued by First American Title Insurance Company.
>
> Excluded from the class are those individuals who now or have ever been executives of Defendants.

27. The class, as defined above, is identifiable. The Named Plaintiff is a member of the class.

28. The class consists, upon information and belief, of thousands and perhaps tens or hundreds of thousands of individuals, and is thus so numerous that joinder of all members is clearly impracticable.

29. There are questions of law and fact which are not only common to the class, but which predominate over any questions affecting only individual class members. The predominating questions include, but are not limited to:

(a) Whether title agents or similar entities partially owned by First American Corporation or its subsidiaries received illegal referral fees or kickbacks in respect of the title insurance issued by First American Title Insurance Company;

(c) Whether First American Corporation's payments to title agents or similar entities for partial ownership interests in the title agents or similar entities for exclusive title insurance referrals to First American Title violated RESPA;

(d) Whether Tower City, or any of the other title agencies owned in part by Defendants, referred title insurance business to First American Title Insurance Company;

(e) Whether title insurance is a settlement service under RESPA;

(f) Whether the Defendants or any of them have entered into similar arrangements with title agents not herein above identified, for the purpose of receiving exclusive referrals in exchange for the payment of illegal fees or kickbacks; and,

(g) Whether the title agents that were purchased in part by Defendants, are affiliates of Defendants.

30. The claims of the Named Plaintiff are typical of the claims of each member of the class, within the meaning of *Fed. R. Civ. P.* 23(a)(3), and are based on

and arise out of identical facts constituting the wrongful conduct of Defendants.

31. Plaintiff is committed to pursuing this action and has retained competent counsel experienced in class action litigation. Plaintiffs will fairly and adequately represent the interests of the members of the class, within the meaning of *Fed. R. Civ. P.* 23(a)(4).

32. The prosecution of separate actions by individual members of the class would create a risk of establishing incompatible standards of conduct for Defendants, within the meaning of *Fed. R. Civ. P. 23*(b)(1)(A).

33. Defendants' actions are generally applicable to the class as a whole, and Plaintiff seeks equitable remedies with respect to the class as a whole within the meaning of *Fed. R. Civ. P.* 23(b)(2).

34. Common questions of law and fact enumerated above predominate over questions affecting only individual members of the class, and a class action is the superior method for fair and efficient adjudication of the controversy, within the meaning of *Fed. R. Civ. P.* 23(b)(3).

35. The class is manageable and, following certification, each member of class who can be located through the information which is readily available from their mortgage transaction, shall receive individual notice through the United States mails.

COUNT I

VIOLATION OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT, 12 U.S.C. §2607

(All Defendants)

36. Plaintiffs reallege and incorporate by reference the allegations set out in Paragraphs 1 through 35 and further allege:

37. Throughout the class period, the Defendant First American Title Insurance Company provided title insurance in respect of residential real estate transactions, including "federally related mortgage loans" as that phrase is defined by RESPA at 12 U.S.C. § 2602(*l*) and at 24 C.F.R. § 3500.2(3), to the named Plaintiff and other consumers. Upon information and belief, the Defendants provided title insurance for more than a million mortgage loans during the class period.

38. At all times during the class period, title agencies owned in part by First American Corporation, including but not limited to Tower City Title Insurance Agency, LLC, contracted with the named Plaintiff and other class members and, as such provided to the Plaintiff and other Class members real estate "settlement services" as that phrase is defined by RESPA at 12 U.S.C. § 2602(3) and 24 C.F.R. § 3500.2(16), including title insurance.

39. Based upon the foregoing facts, the Defendants each violated RESPA with respect to Plaintiff and the Class by giving, paying or receiving fees, kickbacks or other things of value to or from title agencies or similar entities owned in part by First American Corporation, including but not limited to Tower City Title Agency, LLC, pursuant to agree-

ments or understandings that business incident to or a part of a real estate settlement or closing services involving "federally related mortgage loans" would be referred to First American Title.

40. The more than $2 million in payments to Tower City Title Agency, LLC and similar payments to other title agents or similar entities by First American Corporation or its subsidiaries were separate from any division of title insurance premiums that are permitted under § 8(c) of RESPA, 12 U.S.C. § 2607(c).

41. The more than $2 million in payments to Tower City Title Agency, LLC and similar payments to other title agents or similar entities by First American Corporation constituted violations of § 8(a) of RESPA, 12 U.S.C. § 2607(a), which prohibits the payment of referral fees or kickbacks in connection with the origination of federally-related mortgage loans.

WHEREFORE, Plaintiffs pray that the Court:

A. Pursuant to 12 U.S.C. § 2607(d)(2), award Plaintiff and the class members an amount equal to three times the amount of any and all payments to title agents owned in part by First American Corporation or its subsidiaries, including but not limited to Tower City Title Agency, LLC, for title insurance in respect of each mortgage loan transaction, as well a any and all other amounts or damages allowed to be recovered by RESPA;

B. Certify this case as a Plaintiff Class action pursuant to *Fed. R. Civ. P.* 23(b)(1), (2) and/or (3);

C. Permanently enjoin and restrain the Defendants and their agents, employees, representatives

and all persons acting on their behalf from charging and/or collecting any fees attributable to title insurance referred by Tower City Title Agency, LLC or any other title agent owned in part by First American Corporation or its subsidiaries;

D. Award pre-judgment interest;

E. Award Plaintiffs their reasonable costs and attorney's fees; and

F. Award Plaintiffs such other and further relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

42. Plaintiffs demand a jury trial as to all triable issues.

DATED: June 11, 2007

Respectfully submitted,

LAW OFFICES OF JAMES W. SPERTUS

By: /s/ James W. Spertus

James W. Spertus
Lawrence Jones
LAW OFFICES OF JAMES W. SPERTUS
12100 Wilshire Blvd, Suite 620
Los Angeles, California 90025
Telephone: (310) 826-4700
Facsimile: (310) 826-4711

Cyril V. Smith
ZUCKER SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
Telephone (410) 332-0444
Facsimile (410) 659-0436

Richard S. Gordon
Martin E. Wolf
QUINN, GORDON & WOLF, CHTD.
102 West Pennsylvania Avenue, Suite 402
Baltimore Maryland 21294
Telephone (410) 824-2300
Facsimile (410) 825-0066

Edward G. Kramer
David Oakley
THE FAIR HOUSING LA W CLIN1C
3214 Prospect Avenue, East
Cleveland, Ohio 44115
Telephone (216) 431-5300
Facsimile (216) 431-6149

Attorneys for Plaintiffs

OPPOSITION BRIEF

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, D.C. 20036
(202) 778-1800

CYRIL V. SMITH
Counsel of Record
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Baltimore, MD 21202
(410) 332-0444
csmith@zuckerman.com

January 28, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

Respondent submits that the questions presented should be restated as follows:

1. Does section 8(a) of RESPA confer an individual right to purchase real estate settlement services that do not involve an illegal kickback or referral fee?

2. Does the invasion of an individual statutory right to purchase real estate settlement services that do not involve an illegal kickback or referral fee satisfy the Article III case or controversy requirement?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT 2

A. RESPA 3
B. The Title Insurance Industry. 5
C. First American's Referral Purchase Scheme 9
D. Proceedings Below. 10

REASONS FOR DENYING THE PETITION 12

I. THERE IS NO SPLIT IN THE CIRCUITS. ... 12

A. There is No Split Concerning Standing to Sue for Violation of RESPA § 8(a) 12
B. There is Also No Split Over the Test for Article III Standing to Enforce Statutory Rights. 17

II. THE UNANIMOUS VIEW OF THE CIRCUITS THAT HAVE DECIDED THE ISSUES IS CORRECT AND IN ACCORD WITH THE VIEW OF THE AGENCY RESPONSIBLE FOR INTERPRETING RESPA 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) ..... *passim*

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006) 11

Blue Shield of Virginia v. McReady,
457 U.S. 465 (1982) 22

Carter v. Welles-Bowen Realty, Inc.,
553 F.3d 979 (6th Cir. 2009) ..... *passim*

Cohen v. JPMorgan Chase & Co.,
498 F.3d 111 (2d Cir. 2007) 14

Cua-Tumax v. Holder,
343 Fed. Appx. 995 (5th Cir. Sept. 15, 2009) 15

Doe v. Chao,
540 U.S. 614 (2004) 20

Doe v. Nat. Bd. of Med. Examiners,
199 F.3d 146 (3d Cir. 1999), ... 18

Durr v. Intercounty Title Co.,
14 F.3d 1183 (7th Cir. 1994) ..... *passim*

FEC v. Akins,
524 U.S. 11 (1998) 21

Freeman v. Quicken Loans, Inc.,
626 F.3d 799 (5th Cir. 2010) 14

FTC v. Ticor Title Ins. Co.,
504 U.S. 621 (1992) 6

Gomez v. Wells Fargo Bank NA,
2010 WL 3463436 (D. Minn. Aug. 30, 2010). 16

Greenlaw v. United States,
554 U.S. 237 (2008) 11

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 21

Heard v. Bonneville Billing & Collections,
Nos. 99-4092 & 99-4100
(10th Cir. June 26, 2000) 20

Hendry v. Pelland,
73 F.3d 397 (D.C. Cir. 1996); 22

In re Title Ins. Antitrust Cases,
702 F. Supp.2d 840 (N.D. Ohio 2010) 6

Johnson v. United States,
529 U.S. 694 (2000) 15

Langston v. United States,
506 U.S. 930 (1992) 15

Long Is. Health Care at Home, Ltd. v. Coke,
551 U.S. 158 (2007) 21

Mercado v. Calumet Fed. Sav. & Loan Assn.,
763 F.2d 269 (7th Cir. 1985) 13

Moore v. Radian Group, Inc.,
No. 02-41464 (5th Cir. May 30, 2003) 1, 2, 15, 16

Morales v. Attorney's Title Ins. Fund, Inc.,
983 F. Supp. 1418 (S.D. Fla. 1997) 16

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005); 21

Ortiz v. Jordan,
2011 WL 197801 (S. Ct. Jan. 24, 2011) 15

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 23

Robey v. Shapiro, Marianos & Cedja, LLC,
434 F.3d 1208 (10th Cir. 2006) 20

Spears v. Wash. Mut. Bank FA,
2010 U.S. Dist. LEXIS 1454
(N.D. Cal. Jan. 8, 2010) 17

Taylor v. United States,
493 U.S. 906 (1989) 15

United States v. Salinas,
480 F.3d 750 (5th Cir. 2007) 15

Williams v. Dallas Area Rapid Transit,
256 F.3d 260 (5th Cir. 2001) 15

STATUTES

12 U.S.C. § 2601(a). 3

12 U.S.C. § 2601(b)(2) 4

12 U.S.C. § 2607(a) 4, 5, 11, 16

12 U.S.C. § 2607(b) 4, 5

12 U.S.C. § 2607(c)(4) 3

12 U.S.C. § 2607(d)(2) 4, 12

12 U.S.C. § 2617 ..... 2, 5, 21

28 U.S.C. § 1292(b) 11

42 U.S.C. § 3604(c) 19

Ohio Rev. Code § 3935.03 6

Ohio Rev. Code § 3935.04(B) 6

Ohio Rev. Code § 3935.04(D) 6

Ohio Rev. Code § 3935.06 6

Ohio Rev. Code § 3935.07 6

RESPA § 8(a) ..... *passim*

RESPA § 8(b) ..... *passim*

RESPA § 8(d)(2) 4, 10, 12

RULES

Fed. R. Civ. P. 23(f) 10

REGULATIONS

24 C.F.R. § 3500.14(g)(2) 2, 20

OTHER AUTHORITIES

E. Chemerinksky, Constitutional Law: Principles and Policies § 2.3 (3d ed. 2006) 22

Government Accountability Office, Title Insurance: Actions Needed to Improve Oversight of the Industry and Better Protect Consumers, (April 2007) (GAO Report). 5, 6, 7, 8

H.R. Rep. 97-532 (1982). 3

H.R. Rep. 98-123 (1983). 3

House Financial Services Comm., Subcomm. On Housing and Community Opportunity, H.R. Hearing No. 109-88 (April 26, 2006) 8

Restatement (2d) of Agency § 469 (1958) 22

Restatement (3d) of Agency § 8.01, comment (d)(2) (2006) 22

S. Rep. 93-866 (1974) 7

INTRODUCTION

The petition to review the Ninth Circuit's interlocutory ruling should be denied. There is no split in the Circuits on the questions presented in this case. Three Circuits have now addressed statutory and constitutional standing under RESPA § 8(a) in precedential opinions. All of them agree that Congress intended to confer a private right of action for damages on a homebuyer who purchased a real estate settlement service "involved in" the payment of an illegal kickback or referral fee without additional proof of an overcharge, and that it was constitutional for Congress to do so under Article III. Pet. App. 1a-7a; *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009).

Petitioner's claim to the contrary is based on an opinion involving a RESPA provision not involved in this case (*Durr v. Intercounty Title Co.*, 14 F.3d 1183 (7th Cir. 1994)), and a non-precedential opinion that does not establish the law of the Fifth Circuit (*Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003)). *Durr* involved RESPA § 8(b), which forbids fee-splitting, not § 8(a), which forbids kickbacks. *See* Pet. App. 43a (reproducing provisions). The amount "involved in [a] violation" of section 8(b) is the "portion, split, or percentage" of the charge "other than for services actually performed." Suits under section 8(b) thus require proof that a portion of the fee is unearned, *i.e.*, there has been an overcharge. By contrast, when a kickback or referral fee is paid, contrary to section 8(a), the *entire* charge for the service is induced by the illegal payment, so

all of it is is involved in the violation. There is no inconsistency between *Durr*'s holding that section 8(b) liability is based on the amount charged above the value of the "services actually performed" and the decisions in *Edwards*, *Carter*, and *Alston*.

The Fifth Circuit's unpublished decision in *Moore* did mistakenly apply *Durr*'s reasoning to a section 8(a) claim, but that decision has no precedential force in the Fifth Circuit and there is nothing to prevent the Fifth Circuit from agreeing with the Third, Sixth and Ninth Circuits when the issue next arises.

The decisions of the Third, Sixth and Ninth Circuits are also correct. Their conclusion that homebuyers have standing to sue for damages when a settlement service provider pays kickbacks or referral fees accords with the position of the United States in *Carter* and *Alston*, on behalf of the Department of Housing and Urban Development (HUD), the agency charged by Congress with interpreting and implementing RESPA, 12 U.S.C. § 2617, and with HUD's regulations construing the Act. 24 C.F.R. § 3500.14(g)(2) ("The fact that the transfer of the thing of value [as a referral fee or kickback] does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited."). There is no reason for this Court's review.

STATEMENT

This case involves a nationwide scheme by a dominant title insurance firm to lock up referrals

from local title agents by acquiring interests in the title companies in exchange for future referrals, contrary to the purpose and express terms of RESPA.[1] Congress identified such "reverse competition" for referrals as a practice that limits competition and drives up the costs of settlement services for homebuyers, and explicitly created a private right of action to redress the economic harm caused when businesses compete by paying for referrals rather than lowering prices or providing better services to homebuyers.

A. RESPA

RESPA was intended to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). In particular, Congress sought to "effect certain changes

---

[1] Congress did permit investments in companies providing related settlement services without violating the referral fee prohibition. *See* H.R. Rep. 97-532, 52 (1982). Therefore, vague concerns expressed by *amici* about sweeping threats to such arrangements are unfounded. However, to enjoy safe harbor, such affiliated businesses must operate in particular ways and must disclose their affiliation to the consumer. *See* H.R. Rep. 98-123, 77 (1983); 12 U.S.C. § 2607(c)(4). It is undisputed that First American's purchases of interests in title agents did not qualify as exempt "affiliated business arrangements."

Congress also did not forbid exclusive agency agreements unless the agreements involve payments for referrals. The concern raised by *amici* American Land Title Ass'n, *et al.*, (Br. 10-11), about a broad impact on such agreements is unjustified. Neither petitioner nor *amici* point to any development in the wake of the earlier decisions in *Carter* or *Alston* that threatens lawful agreements.

in the settlement process for residential real estate that will result — * * * (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

To achieve that purpose, Congress prohibited payments for referrals, and enforced that prohibition by a private right of action. RESPA § 8(a), 12 U.S.C. § 2607(a), provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

A separate provision, RESPA § 8(b), 12 U.S.C. § 2607(b), forbids fee-splitting (payment or receipt of "unearned fees"), and does not require proof that the payment was made for a referral. The same private civil enforcement provision applies to both of the statutory prohibitions. RESPA § 8(d)(2), 12 U.S.C. § 2607(d)(2), provides:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three

> times the amount of any charge paid for such settlement service.

"Such settlement service" refers to "the settlement service involved in the violation" as defined in either 12 U.S.C. § 2607(a) or (b). Congress expressly delegated authority to HUD to implement and interpret RESPA through regulations and policy statements. 12 U.S.C. § 2617.

B. The Title Insurance Industry.

Payments for title insurance referrals are a prime example of the kind of practice Congress intended to stop. The business of title insurance in the United States is both highly profitable (less than 5% of revenues goes to pay claims, compared with over 70% in most other lines of insurance) and highly concentrated (the leading insurers, including Petitioner First American, have captured over 90% of the market).[2] Government Accountability Office, Title Insurance: Actions Needed to Improve Oversight of the Industry and Better Protect Consumers, 9, 11, 41 (April 2007) (GAO Report). Because the field is so highly concentrated, in many states—including states with statutory schemes like Ohio—large title insurers can collectively set prices

---

[2] The industry is even more concentrated now than when the GAO issued its report. There are now only four major title insurers: petitioner First American and *amici* Fidelity, Stewart Title, and Old Republic. Fidelity acquired most of the subsidiaries of LandAmerica in bankruptcy proceedings.

that are much higher than actual costs of any of the services they provide or the risks they insure.[3]

As explained in the GAO Report issued while First American was carrying out its scheme, "consumers find it difficult to shop for title insurance based on price." *Id.* at 3.[4] Instead, consumers rely

---

[3] It is not true that all title insurance in Ohio must be sold at a "uniform, state-regulated rate." (Pet. 7). *See* Ohio Rev. Code § 3935.03 (uniformity neither required nor forbidden). Ohio permits (but does not require) title insurers to collaborate on rate-setting through a state-authorized bureau (the Ohio Title Insurance Rating Bureau) operated by a private corporation called Demotech, Inc. Ohio Rev. Code § 3935.04(B); *see* http://www.otirb.com (rating bureau website); http:www.demotech.com (Demotech website). Rates go into effect unless disapproved by the state Superintendent of Insurance within thirty days. Ohio Rev. Code § 3935.04(D). The rating bureau statute thus seemingly confers state immunity upon what would otherwise be an illegal cartel. Ohio Rev. Code § 3935.06. *See In re Title Ins. Antitrust Cases*, 702 F. Supp.2d 840 (N.D. Ohio 2010) (antitrust claims barred by "filed rate" doctrine); *cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (describing standards for state action antitrust immunity). However title insurers (even those that participate in the bureau) are not required to price their insurance at the rates set by the bureau. Ohio Rev. Code § 3935.07 (participants in rating bureau may seek approval for different rates). Because the industry is so concentrated, however, the practical effect of the state rate-setting scheme is to allow the dominant insurers to set prices at monopoly levels.

[4] In that regard, the situation is much as Congress found it in 1974:

> The average person . . . is a captive customer in the hands of the lender, the real estate agent or the attorney. He has no basis for judging whether a particular fee or charge is reasonable, particularly when the amount of the fee or

on referrals to make their purchases. *Id.* at 25. Consumers are unfamiliar with title insurance and buy it only a few times in their lives, when they purchase or refinance a home. *Id.* at 21. It is hard for consumers to compare prices for title insurance services, and title insurance is only a small part of a complex larger transaction that occupies the buyer's attention. *Id.* at 22. As the GAO Report explains:

> by the time consumers receive an estimate from the lender of their title insurance costs as part of the Good Faith Estimate, a title agent has already been selected, and the title search has already been requested or completed. To shop around for another title insurer at that point in the process could also threaten to delay the scheduled closing. According to a number of title industry officials and state insurance regulators we spoke with, most consumers place a higher priority on completing their real estate

---

charge is small relative to the total purchase price of the house. Once a buyer is committed to a particular purchase, he is in no position to question individual charges which may be tacked on by various partial participants in the settlement process. It is unrealistic to assume that consumers will suddenly begin shopping for settlement services. A few sophisticated buyers might. However, the vast bulk of consumers will go along with whatever charges are imposed as they do today.

S. Rep. 93-866, 18 (1974).

> transaction than on disrupting or delaying that transaction to shop around for potentially small savings.

Id. at 23.

Instead of competing for homebuyers' business on the basis of price or service, title insurers engage in what is known as "reverse competition," for referrals from the real estate professionals on whom ordinary consumers rely for advice in their home purchase transactions. *Id.* at 25 ("According to title industry officials, because of consumers' unfamiliarity with and infrequent purchases of title insurance, it is not cost-effective to market to them. Rather, title agents market to and compete for referrals from real estate and mortgage professionals.").

The availability of referral fees gives title agents and other real estate professionals an incentive to steer homebuyers to the firms that offer the best compensation for referrals, rather than the best price or service for the homebuyer. GAO Report at 25-26; House Financial Services Comm., Subcomm. on Housing and Community Opportunity, H.R. Hearing No. 109-88, 29 (April 26, 2006) (Testimony of J. Robert Hunter, Consumer Federation of America); *id.* at 49 (Testimony of Gary M. Cunningham, HUD, referring to 1980 study describing "reverse competition" in title insurance, which persists). In some markets, title insurers that will not pay for referrals are excluded from most transactions, preventing competition that benefits consumers. *Id.* at 30-31 (Testimony of Douglas Miller, President and CEO of Title One). Because

real estate professionals, not homebuyers, actually choose the insurer, the usual market mechanisms do not restrain pricing as long as referral fees continue to be paid.

The prohibition against kickbacks and referral fees was intended to change the way the market for settlement services operates—to stop title insurers and other settlement service providers from engaging in reverse competition so that they would instead compete for customers on the basis of lower prices or better service. Because standard prices within the existing market reflect the perverse incentives of reverse competition, the harm to consumers has nothing to do with overcharges in any individual transaction, *i.e.*, whether the title insurer has charged more than its usual fee.

C. First American's Referral Purchase Scheme

Edwards bought title insurance from First American through a referral from Tower City, the title company that conducted the closing on her home purchase. Unknown to Edwards, the title company was partially owned by First American. The class action complaint, (Pet. App. 53a (Complaint, ¶ 21)); supported by a declaration from a company insider; (CA ER 68-73 (Stipanovich declaration)), alleged that First American had similarly paid to acquire interests in numerous local title companies across the country (the captive title agents). Although the terms of the deals sometimes varied, the common feature of all of them was a promise to refer title insurance business to First American. That promise

was a material term, and indeed the object, of every agreement, and First American's contract consideration was given for the promise of referrals as well the other terms. (CA ER 73, ¶ 23). The agreements thus exchanged "a thing of value"—some portion of the contract consideration—for referrals, contrary to RESPA § 8(a). Each purchase of First American title insurance in connection with a home purchase through one of the captive title agencies was "involved in the violation."

D. Proceedings Below.

Edwards filed a class action complaint on June 11, 2007 (Pet. App. 48a-60a). The district court denied First American's motion to dismiss for lack of standing (Pet. App. 13a-19a). The district court subsequently denied Edwards' motions to certify a nationwide class of customers of First American's captive title agents (Pet. App. 23a-30a) and a class limited to customers of First American's Tower City subsidiary. (Pet. App. 31a-40a).

Edwards appealed the two orders denying class certification to the Ninth Circuit pursuant to Fed. R. Civ. P. 23(f). The Court of Appeals issued both a precedential opinion (Pet. App. 1a-7a) and a non-precedential memorandum (Pet App.8a-11a). In the non-precedential memorandum, the Court of Appeals reversed the denials of class certification, holding that the district court had abused its discretion in denying certification of a nationwide class without allowing discovery (Pet. App. 9a), and had abused its discretion in denying certification of the Tower City class. (Pet. App. 11a). First

American's petition does not challenge those rulings.[5] Class discovery is now underway on remand.

In its precedential opinion, the Court of Appeals expressly agreed with the two circuits that had previously addressed the question of standing to sue for kickback violations under RESPA § 8(a), 12 U.S.C. § 2607(a), affirming the district court in that respect. (Pet. App. 7a).[6] The Court of Appeal denied First American's petition for rehearing en banc challenging the precedential opinion, with no judge requesting a vote. (Pet. App. 41a).

---

[5] Accordingly, contrary to the submission of *amici* American Escrow Ass'n, *et al.*, (Br. 5-6), this case is not a vehicle to address issues about class action litigation under RESPA.

[6] First American moved to dismiss the appeal, asserting a lack of subject matter jurisdiction based on the absence of Article III standing. Pet. 9. The asserted basis for appellate jurisdiction to review Edwards' *statutory* right to sue under RESPA is unclear, however. *See* Pet. App. 2a (incorrectly stating that the Defendants appealed the denial of their motion to dismiss, and citing 28 U.S.C. § 1292(b)). The question whether Edwards sufficiently pleaded a claim under RESPA § 8(a) does not implicate subject matter jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). First American's motion to dismiss Edwards' appeals did not allow First American to seek a modification of the judgment in its favor by obtaining an outright dismissal of the complaint on grounds other than lack of subject matter jurisdiction. *Greenlaw v. United States*, 554 U.S. 237 (2008). There was no cross-appeal.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS.

A. There is No Split Concerning Standing to Sue for Violation of RESPA § 8(a).

The Petition erroneously claims there is a split in the Circuits over whether RESPA § 8(d)(2), 12 U.S.C. § 2607(d)(2), requires proof that the RESPA violation increased the cost of the settlement service. (Pet. 11-12). Section 8(d)(2) authorizes suits to recover damages by "the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service" (Pet. App. 46a). However, that provision is not a self-contained right of action. It is the enforcement mechanism for rights defined in sections 8(a) and (b). Those provisions, rather than section 8(d)(2) itself, create the individual statutory rights that determine statutory and Article III standing. There is no split about standing to sue based on a violation of section 8(a).

RESPA § 8(a) is violated whenever a referral fee or kickback is paid. (Pet. App. 43a). RESPA § 8(b) is violated when any "portion, split, or percentage" of a settlement charge is paid "other than for services actually performed." (*Id.*). Thus, a violation of § 8(b) involves an overcharge (in the sense that the fee paid is for more than the services actually performed), but § 8(a) does not. The difference between fee-splitting claims (governed by § 8(b)) and referral-fee claims (governed by § 8(a)

accounts for the difference between the Seventh Circuit's decision in *Durr* and the Third, Sixth and Ninth Circuit decision in *Alston*, *Carter* and *Edwards*.

Durr involved an appeal from the dismissal of and imposition of Rule 11 sanctions for a complaint seeking damages under RESPA based on a title agent's overcharge for recording a deed and mortgage. The complaint in that case alleged a violation of RESPA § 8(b). 14 F.3d at 1186 (quoting section 8(b)); *see* Pet. App. 43a (reproducing statutory text); Pet. 12 & n.7 (*Durr* involved a claim under § 8(b)). Although the only alleged overcharge was for a recordation fee, the plaintiff also sought to recover damages for other fees as well.

The Seventh Circuit held that the complaint did not state a claim under RESPA because, although it alleged an overcharge, there was no fee-splitting:

> the plaintiff failed to allege that [the title agent's] overcharge was in the nature of a "portion, split, or percentage of any charge" given to a third party. If anything, [the title agent's] overcharge was simply a windfall it kept for itself. As we stated in *Mercado* [*v. Calumet Fed. Sav. & Loan Assn.*, 763 F.2d 269 (7th Cir. 1985)], RESPA 'requires at least two parties to share fees." *Id.* at 270. Therefore, the district court correctly dismissed the case because there was no allegation that Intercounty shared the $8.00 [recordation fee overcharge] with anyone.

14 F.3d at 1187.[7] That holding has no relevance to whether proof of an overcharge is required to state a claim for damages based on the payment of a kickback or referral fee under § 8(a). Nor is there any relevance to the Seventh Circuit's holding that Rule 11 sanctions were properly imposed on the plaintiff for seeking damages for settlement services under section 8(b) as to which no overcharge was even alleged. 14 F.3d at 1188; *see id.* at 1185 (distinguishing fee for which an overcharge was alleged from fees that were not challenged).

Because *Durr* involved section 8(b), not section 8(a), and had nothing to do with kickbacks or referral fees, there was no reason for the Ninth Circuit below to discuss *Durr* or to acknowledge a split. *See* Pet. 10 (Ninth Circuit failed to acknowledge contrary decisions), 14 (accusing the Ninth Circuit of ignoring *Durr*). Contrary to the implication of the Petition (*id.* at 14-15), the Sixth Circuit in *Carter* did not acknowledge a split with the Seventh Circuit. 553 F.3d at 983 ("no circuit court has squarely confronted the issue of standing in the absence of monetary injury" but noting a divergence among district courts, including the district court in *Durr*). Likewise, the Third Circuit in *Alston* identified only "a split of district court authority." 585 F.3d at 760 & n.7 (citing the district court decision in *Durr* and its affirmance). Even *Amici* American Land Title

---

[7] There is an acknowledged circuit split over whether unearned fees that are not divided between two parties as a kickback violate RESPA § 8(b). *Compare Freeman v. Quicken Loans, Inc.*, 626 F.3d 799 (5th Cir. 2010) *with Cohen v. JPMorgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007), but that issue is not presented in this case.

Association, *et al.* (at p. 8, citing *Durr* with a *cf.*) rightly decline to cite *Durr* as establishing a Circuit split.

The unpublished decision in *Moore* does not create a conflict meriting review because that decision is not precedent in the Fifth Circuit. 5th Cir. R. 47.5.4; *Taylor v. United States*, 493 U.S. 906 & n.* (1989) (opinion of Stevens. J., respecting denial of petition for certiorari) (noting absence of an inter-Circuit conflict because a published Fifth Circuit decision shortly after the conflicting decision in petitioner's case agreed with the other Circuits that had addressed the question); *Cua-Tumax v. Holder*, 343 Fed. Appx. 995, 997, n.7 (5th Cir. Sept. 15, 2009) (unpublished decisions not binding); *United States v. Salinas*, 480 F.3d 750, 758 n.8 (5th Cir. 2007) (expressly declining to endorse the reasoning of a prior unpublished opinion); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (noting conflict between the panel decision and a prior unpublished and therefore non-precedential opinion).[8]

---

[8] The Court has sometimes included an unpublished opinion in listing one side of a Circuit split in addition to divergent published opinions. *Ortiz v. Jordan*, 2011 WL 197801, *2 n.1 (S. Ct. Jan. 24, 2011); *Johnson v. United States*, 529 U.S. 694, 699 n.3 (2000); *see also Langston v. United States*, 506 U.S. 930, 931 (1992) (White, J., dissenting from denial of certiorari). The Court also sometimes has granted review of an unpublished decision in cases where there is a split in the Circuits in published opinions. In those situations, a non-precedential opinion may demonstrate the persistence of a conflict existing among precedential decisions (*see* E. Gressman, *et al.*, Supreme

Moore involved a claim that Wells Fargo violated RESPA § 8(a) by receiving kickbacks in the form of reduced fees for the insurance Wells Fargo was required to purchase to sell pools of mortgages in the secondary market, in exchange for referring its customers to Radian to buy private mortgage insurance (PMI) on their individual home loans. The court of appeals held that the complaint did not state a claim because it did not allege that the plaintiffs were overcharged for the PMI they purchased. The court relied for that conclusion on *Durr*, overlooking the fact that *Durr* involved section 8(b), not section 8(a). *Moore*, at 9 (referring to *Durr* as one of "two cases reviewing the damages available to private plaintiffs in § 2607(a) [RESPA § 8(a)]").[9]

A division among district courts when the Circuits are united is not a ground for review by this Court. Rule 10. But even if it were, there would be no need for review here. There is little probability that any division among district court judges will persist in light of the clear and correct guidance provided in the unanimous Circuit opinions. The only district court case decided after *Carter* and *Alston* reached the same conclusion as all of the courts of appeals. *Gomez v. Wells Fargo Bank NA*, 2010 WL 3463436 (D. Minn. Aug. 30, 2010). Pet. 16

Court Practice, 263 (9th ed. 2007)) or it may serve as a vehicle for resolving one. We are not aware of any case in which the existence of a Circuit split has been premised *solely* on a non-precedential opinion disagreeing with otherwise unanimous Circuits.

[9] The Fifth Circuit also relied on a district court opinion, *Morales v. Attorney's Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1428 (S.D. Fla. 1997), that itself mistakenly relied on *Durr*.

nn.10-13. And even before *Carter*, the trend and the majority of the district court opinions agreed with the unanimous courts of appeals. *See Spears v. Wash. Mut. Bank FA*, 2010 U.S. Dist. LEXIS 1454 (N.D. Cal. Jan. 8, 2010).

B. There is Also No Split Over the Test for Article III Standing to Enforce Statutory Rights.

Petitioner also suggests there is also a conflict about when statutory violations confer Article III standing. The Petition ranges far and wide for decisions involving other statutes, claiming the decision below conflicts with a Second Circuit decision involving ERISA (*Kendall v. Employees' Retirement Plan*, 561 F.3d 112 (2d Cir. 2009)), and a Tenth Circuit decision involving the Fair Housing Act (*Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996)). (Pet. 18-19). But there is no conflict. The cases agree on the governing standard: "[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Pet. App. 4a (citations omitted); *Carter*, 553 F.3d at 988-89; *Alston*, 585 F.3d at 763; *Kendall*, 561 F.3d at 118; *Wilson*, 98 F.3d at 595. *See* Br. *Amici* American Escrow Ass'n, *et al.*, 14 (citation omitted) ("No one doubts that Congress may create new interests the invasion of which may confer Article III standing."). The cases diverge not over the constitutional test, but over whether particular statutes other than RESPA confer individual predicate statutory rights in particular circumstances having nothing to do with this case. The application of an uncontroversial

constitutional standard to disparate statutes in disparate factual settings does not create a conflict.[10]

The Second Circuit's decision in *Kendall* turned on its prior interpretation of ERISA to require an individual demonstration of financial harm in order to bring a monetary claim for equitable restitution or disgorgement, a holding tied to the

---

[10] The situation is different for statutes like RESPA, that create *individual* rights tied to causes of action (where individual injury is inherent in a statutory violation), than it is for statutes like the Administrative Procedures Act (where injury to the individual plaintiff is not inherent). The relevant distinction is the public or private character of the statutory right, rather than whether the suit is against a public or private defendant, as an *amicus* brief suggests. Law Professors Br. at 7. This case is, in any event, not an appropriate vehicle to explore the question whether "injury in fact" may be dispensed with in suits against private parties, because injury in fact is established here by the invasion of an individual statutory right.

Amici Law Professors (Br. 4) cite language in *Doe v. Nat. Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999), stating that more than a statutory violation is required for standing in a case under the Americans with Disabilities Act. The Third Circuit concluded that the plaintiff could not show standing based on the possibility of future discrimination, but held that the plaintiff did have standing because flagging his test scores identified him as disabled in violation of the Act. Thus, *Doe* is perfectly consistent with the Ninth Circuit's ruling in this case that the invasion of an individual statutory right suffices for standing, and with the Third Circuit's ruling to the same effect in *Alston*. *Doe* merely rejects standing on the basis of a speculative future violation merely because such a violation is pleaded in the complaint. That is not an issue here. *Doe* certainly does not hold that Congress cannot recognize new rights and give them statutory protection enforceable in federal court under Article III. There is no intra-Circuit conflict.

difference between ERISA's protection of a benefits plan as opposed to an individual beneficiary of a plan. 561 F.2d at 120. The Second Circuit explicitly recognized, as did the Ninth Circuit, that Congress may create statutory rights giving rise, when invaded, to standing. 561 F.3d at 118 (quoting the language reproduced at Pet. App. 4a). However, the plaintiff in *Kendall* could not meet that standard because under Circuit precedent she lacked the *statutory* right to seek monetary relief. That has nothing to do with the Article III standing of a homebuyer to seek relief for a violation of her statutory right under RESPA.

The Tenth Circuit's decision in *Wilson* likewise turned on the scope of a statutory right—whether the Fair Housing Act protected anyone exposed to a discriminatory advertisement, regardless whether that person would have been able to rent the housing units absent discrimination. As in *Kendall*, the court acknowledged that standing "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" 98 F.3d at 595, but found no such invasion of a statutory right. The plaintiffs were not Brigham Young students and therefore could not qualify for the student housing being advertised. The Tenth Circuit concluded that the "provision at issue here is 42 U.S.C. § 3604(c), which prohibits discriminatory advertisements, but does not expressly state that advertisements and statements to 'any person' are unlawful; the subsection does not designate to whom the statements must be made to be unlawful. Subsection (c) therefore does not give all persons an express statutory right to be free from discriminatory

advertising." 98 F.3d at 596. To be sure, the *Wilson* Court's reading of the Fair Housing Act was informed by Article III concerns, *id.*, but the outcome turned on the statute, not on a different constitutional test for standing.[11]

II. THE UNANIMOUS VIEW OF THE CIRCUITS THAT HAVE DECIDED THE ISSUES IS CORRECT AND IN ACCORD WITH THE VIEW OF THE AGENCY RESPONSIBLE FOR INTERPRETING RESPA.

All of the Circuits that have considered the issue have construed RESPA § 8(a) to give homebuyers protection against the purchase of settlement services tainted by the payment of a kickback or referral fee, regardless of whether the particular fee charged was increased as a result of the kickback. That interpretation accords with HUD's regulation interpreting the statute. 24 C.F.R. § 3500.14(g)(2) ("The fact that the transfer of a thing

---

[11] The Petition also refers to a non-precedential Tenth Circuit decision in *Heard v. Bonneville Billing & Collections*, Nos. 99-4092 & 99-4100 (10th Cir. June 26, 2000). The fee-splitting claim in *Heard* was based on a violation of state legal ethics rules, rather than on the invasion of a federal statutory right. *Heard* does not evidence a Circuit split about the test for Article III standing applicable to claims under the Fair Debt Collections Practices Act. A more recent published decision from the same Circuit held that a plaintiff had standing to sue under the same statute at issue in *Heard* to vindicate the invasion of a statutory right despite the absence of economic damage. *Robey v. Shapiro, Marianos & Cedja, LLC*, 434 F.3d 1208, 1209-10 (10th Cir. 2006). Cf. *Doe v. Chao*, 540 U.S. 614, 624, 625 (2004) (distinguishing between Article III standing and recovery of statutory damages under the Privacy Act).

of value [as a kickback or referral fee] does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited."). *See Carter*, 553 F.3d at 987 (discussing regulation and United States' brief). Congress delegated responsibility to HUD to implement RESPA, also conferring explicit authority to interpret the Act. 12 U.S.C. § 2617. HUD's interpretation is therefore entitled to *Chevron* deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005); *Long Is. Health Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007); *Carter*, 553 F.3d at 987-88. Regardless of whether there is an "overcharge," when a referral fee or kickback is paid, the settlement service is "involved in [a] violation" of RESPA.

Congress created an individual right against real estate settlement providers paying kickbacks or referral fees because of the systemic effect of such kickbacks on prices. A homebuyer's statutory right is invaded whenever a kickback or referral fee is paid in connection with a settlement service he or she has purchased. That is "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (invasion of "statutorily created right to truthful housing information"); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (statutory right to information about campaign contributions).

First, RESPA gives homebuyer a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement). The invasion of that statutory right is an injury conferring standing without proof of an out-of-pocket "overcharge." It has long been true that an agent

who breaches a duty of loyalty to the principal forfeits the right to compensation, even without proof of financial injury to the principal. *See, e.g.*, *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996); Restatement (2d) of Agency § 469 (1958); Restatement (3d) of Agency § 8.01, comment (d)(2) (2006). "Injury to rights recognized at common law—property, contracts and torts—are sufficient for standing purposes. E. Chemerinksky, Constitutional Law: Principles and Policies § 2.3 at 68 (3d ed. 2006).

Second, even if economic injury were required, kickbacks cause economic injury to those who purchase settlement services on which kickbacks have been paid, because they thwart competition. Although Petitioner equates the absence of an "overcharge" with the absence of economic injury (e.g., Pet. 23), that is simply not the case. A homebuyer who purchases a settlement service as a result of a kickback scheme like First American's has been injured not only by the invasion of a statutory right to conflict-free referrals, but also by the systemic effects of reverse competition on pricing. *See Carter*, 553 F.3d at 988. Once settlement service providers may no longer engage in reverse competition for referrals—a practice that benefits real estate insiders, not consumers—then they will have to compete as businesses ordinarily do, by offering homebuyers lower prices or better service. Those economic effects are not discrete "overcharges" (as would be the case under RESPA section 8(b)), but they are just as real as the harms to customers buying goods in a market that has been monopolized or subject to illegal pricing agreements. *See Blue Shield of Virginia v. McReady*, 457 U.S. 465, 480-81

(1982) ("we think it clear that McCready was 'within that area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse"; citation omitted); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (consumer is injured for purposes of Clayton Act "when the price of those goods or services is artificially inflated by reason of the anticompetive conduct complained of.").

Congress was free to tie damages for RESPA violations to the charge paid for the settlement service (just as faithless fiduciaries could be required to disgorge their fees), and in any event the appropriateness of that measure of damages has nothing to do with the questions presented which concern only standing to sue.

An individual who has received self-interested advice and paid prices set in a market without price competition has suffered the economic injury Congress intended to prevent and has standing to bring an action against such conduct.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Cyril V. Smith*
Zuckerman Spaeder LLP
100 East Pratt Street
Baltimore, MD 21202
(410)-332-0444
csmith@zuckerman.com

David A. Reiser
Zuckerman Spaeder LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

Date: January 28, 2011

* Counsel of Record

REPLY BRIEF

Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

February 9, 2011

CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their petition for a writ of certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. THE CIRCUITS ARE DIVIDED ON THE STATUTORY AND CONSTITUTIONAL STANDING QUESTIONS PRESENTED 2

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S STANDING JURISPRUDENCE 7

III. THE QUESTIONS PRESENTED ARE OF SINGULAR IMPORTANCE TO THE INDUSTRY 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 7

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 6-7

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 7

Doe v. National Bd. of Med. Examiners, 199 F.3d 146 (3d Cir. 1999) 7

Durr v. Intercounty Title Co., 14 F.3d 1183 (7th Cir. 1994) 1, 4, 5

Gollust v. Mendell, 501 U.S. 115 (1991) 9

Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996) 8

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 2, 5, 6, 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 10

Moore v. Radian Group, Inc.:

233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf 3, 4

No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf 1, 3, 4

Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997) 3, 4

Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) 4

Shaw v. Marriott Int'l, Inc., 605 F.3d 1039 (D.C. Cir. 2010) 7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 9

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 7

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 2, 9

Williams v. Dallas Area Rapid Transit, 256 F.3d 260 (5th Cir. 2001) 3

Williams v. First Am. Title Ins. Co., No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005) 3, 5

Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590 (10th Cir. 1996) 6, 7

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. art. III 1, 2, 3, 5, 7, 9, 10

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 5

29 U.S.C. § 1132(a)(3) 6

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* 1, 2, 3, 4, 6, 7, 8, 11

§ 8(a), 12 U.S.C. § 2607(a) 4

§ 8(b), 12 U.S.C. § 2607(b) 4

§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 1, 2, 4, 8

24 C.F.R.:

§ 3500.14(a) 8

§ 3500.14(g)(2) 8

5th Cir. R. 47.5.1 3

LEGISLATIVE MATERIALS

Title Insurance – Cost and Competition: Hearing Before the Subcomm. on Housing & Community Opportunity of the H. Comm. on Financial Services, 109th Cong. (Apr. 26, 2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:30539.pdf 10

ADMINISTRATIVE MATERIALS

U.S. Gov't Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, GAO-07-401 (Apr. 2007), *available at* http://www.gao.gov/new.items/d07401.pdf 10

OTHER MATERIALS

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 2, 4

The parties agree that this case cleanly presents the question whether a private plaintiff can establish standing to sue under RESPA and Article III by alleging "the invasion of an individual statutory right," Opp. 18 n.10, in the absence of any concrete injury. Respondent likewise does not question that this case presents issues of exceptional importance, both because of its implications for parties that are subject to RESPA, *see* Br. of Am. Escrow Ass'n, *et al.*; Br. of Am. Land Title Ass'n, *et al.*, and because of the significance of the recurring constitutional question presented, *see* Br. of Law Professors.

Contrary to respondent's argument, a division among the circuits exists and will likely endure unless the Court addresses the issue. Respondent concedes that the decision of the Ninth Circuit (along with those of the Third and Sixth Circuits) conflicts with the Fifth Circuit's (unreported) decision in *Moore*. Although the Fifth Circuit decision is unreported, it will nevertheless guide parties' conduct. The Fifth Circuit's disposition of *Moore* has already been treated as effectively controlling by a district court in the Fifth Circuit and would almost certainly be followed in the future – if any plaintiff were clumsy enough not to seek a friendlier forum. Respondent's effort to explain away *Durr* is no more persuasive: the Seventh Circuit specifically held that RESPA authorizes recovery of overcharges only, *not* legitimate charges for the settlement services involved in the overcharge. *Durr* has been correctly understood by district courts (and by the Fifth Circuit) to deny standing under § 8(d)(2) of RESPA – the provision at issue here – to a plaintiff who, like respondent, cannot allege such injury.

The Ninth Circuit's resolution of the Article III issue conflicts with the determination of other courts in the Second and Tenth Circuits that the allegation of a statutory violation connected to a transaction involving the plaintiff is insufficient to confer standing absent a distinct injury.

Furthermore, the Ninth Circuit's ruling is incorrect. That court's understanding that the availability of a remedy, without more, is sufficient to confer standing conflicts with this Court's analysis in *Vermont Agency*, a case that respondent fails even to cite. Respondent's suggestion (at 22) that she suffered economic harm by virtue of the "systemic effects" of generic conduct not only lacks support in the record; it is also the type of "entirely speculative" harm that has been held insufficient to establish standing to sue. *Kendall*, 561 F.3d at 122 (internal quotations omitted).

I. THE CIRCUITS ARE DIVIDED ON THE STATUTORY AND CONSTITUTIONAL STANDING QUESTIONS PRESENTED

A. Respondent argues (at 1) that "[t]here is no split in the Circuits," but, in the Fifth and Seventh Circuits, a plaintiff suing under § 8(d)(2) of RESPA must show injury in fact (i.e., an overcharge), not merely that the settlement charge she paid was connected to a violation of the statute that did not affect her directly.[1]

---

[1] Because the Ninth Circuit actually decided the issue of statutory standing, and because the existence of a supposed cause of action under RESPA was the sole basis for the Ninth Circuit's resolution of the constitutional standing issue, the statutory issue is properly presented, and respondent does not argue otherwise. *Cf.* Opp. 11 n.6; Pet. 24 n.16 (citing cases for the

1. Respondent concedes that *Moore* conflicts with the Ninth Circuit's decision, but argues that this conflict does not "merit[] review" because the Fifth Circuit's decision is "not precedent" in the Fifth Circuit. Opp. 15. Whether that is true as a technical matter, it is not true as a practical matter. *Moore* affirmed the (reported) judgment of the District Court for the Eastern District of Texas, which held that Congress did not "intend[] to allow a private plaintiff to sue for an alleged violation of RESPA's anti-kickback provision when the plaintiff has not alleged that the referral arrangement increased any of the settlement charges at issue or that any portion of the charge for the settlement service was involved in the kickback violation." *Moore*, 233 F. Supp. 2d at 824 (citing *Durr* and *Morales*). Under Fifth Circuit rules, the affirmance of the district court's decision reflects the panel's judgment (confirmed by the unpublished opinion) that the district court's analysis is correct. *See Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc); 5th Cir. R. 47.5.1. District courts in the Fifth Circuit can accordingly be expected to follow *Moore*, and at least one has already done so. *See Williams*, No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460, at *2. This Court regularly grants review of unpublished decisions;[2] the importance of clarifying governing law is not limitcd to what appears between the covers of the Federal Reporter.

---

proposition that statutory standing may be considered before Article III standing).

[2] *See* Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007) ("[T]he Court grants certiorari to review unpublished and summary decisions with some frequency.") (citing cases).

2. The attempt to distinguish *Durr* because the underlying violation of RESPA involved § 8(b) (which involves fee-splitting in particular) rather than § 8(a) (which involves referral fees more generally) does not hold water. The issue in *Durr*, as here, was whether RESPA provides for recovery of fees charged for services actually rendered – rather than for an overcharge alone – simply because the transaction was connected to an alleged violation. The Seventh Circuit noted that the district court did *not* impose sanctions because the plaintiff's "basic theory of recovery" – that is, his claim that the overcharge violated § 8(b) of RESPA – "was so far outside of the purview of RESPA that he should be sanctioned." 14 F.3d at 1187. Rather, the court found that the plaintiff "identified only an $8.00 overcharge [but] nevertheless sued to recover all the charges that Intercounty made to Durr" even though "[t]here was never an allegation that these fees were illegitimate." *Id.* at 1188.[3] That is why courts (including the district court and Fifth Circuit in *Moore*, the Florida district court in *Morales*, and the North Carolina district court in *Mullinax*) have correctly understood *Durr* to hold that § 8(d)(2) confers statutory standing only in cases involving overcharges, not in cases involving uninflated charges connected to alleged RESPA violations. *See Mullinax*, 311 F. Supp. 2d at 486 ("In summary . . . , the holdings of *Durr*, *Morales*, and *Moore* demonstrate that Plaintiffs in this case lack standing to pursue their RESPA claims.").

---

[3] The overcharge at issue in *Durr* was not a separate fee but was part of the fee imposed for recording the deed and the mortgage. *See* 14 F.3d at 1184. The recordation fee, in particular, was among those that the Seventh Circuit said were not "illegitimate." *Id.* at 1188; *see also Mullinax*, 311 F. Supp. 2d at 484.

3. Acknowledging that the federal courts have reached conflicting results on the statutory question presented, respondent speculates that "[t]here is little probability" that the split of authority "will persist." Opp. 16. To the contrary, unless the Court grants review, the conflict will almost certainly remain unresolved: reasonably careful plaintiffs' counsel will pursue claims in those circuits where the law is favorable, not where the law is unfavorable. *See* Am. Escrow Ass'n Br. 5-6. We have been unable to locate a single district court decision in the Seventh Circuit since *Durr* or in the Fifth Circuit since *Williams* that confronted the standing issues presented in this case. This case presents the appropriate vehicle to resolve the persistent confusion.

B. Respondent argues that there is no split in the circuits on the Article III question because cases diverge, not over the requirement of a distinct injury beyond the invasion of a statutory right, but instead "over whether particular statutes . . . confer individual predicate statutory rights." Opp. 17. But if respondent were correct, then none of the cases cited in the petition would have discussed the requirements of Article III – they would simply have addressed *statutory* standing. In fact, the circuits have "disagree[d] . . . over whether [constitutional] standing may be based on the violation of a [statutory] right alone." Law Professors Br. 3.

Kendall rejected the plaintiff's argument that ERISA "does not require a showing of direct injury" – beyond an alleged violation of ERISA affecting a plan of which she was a beneficiary – based on the Article III requirement that she "demonstrat[e] individual loss, to wit, . . . an injury-in-fact." 561 F.3d at 119 (internal quotations omitted). ERISA authorizes a

civil action by "a participant, beneficiary, or fiduciary" "to enjoin any act or practice which violates any provision of this subchapter." 29 U.S.C. § 1132(a)(3). By its terms, that does not require a plan beneficiary to show an injury aside from an alleged breach of a statutory duty. The Second Circuit nevertheless rejected the claim "that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for *constitutional* standing." 561 F.3d 121 (emphasis added). In the absence of a non-speculative allegation that the alleged breach had caused the plan beneficiary concrete harm, the plaintiff lacked standing.[4]

Likewise, *Wilson* held that, although "[s]tanding under the Fair Housing Act is as broad as permitted by Article III," the plaintiffs lacked standing. 98 F.3d 593. Although the plaintiffs had read the discriminatory advertisement (and thus been subjected to the statutory violation), the Tenth Circuit explained that "mere receipt by plaintiffs of the [allegedly unlawful] advertisements" does not create a constitutionally cognizable injury, because "'"the psychological consequence presumably produced by observation of conduct with which one disagrees" . . . do[es] not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue.'" *Id.* at 596 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605,

---

[4] The conflict between *Kendall* and the decision below is particularly clear because the statutory right allegedly violated in *Kendall* – that is, the fiduciary obligation of the plan administrator – is analogous to the supposed "right to conflict-free referral advice" under RESPA, the invasion of which respondent claims is sufficient to confer standing "even without proof of financial injury." Opp. 21-22.

616 (1989) (plurality), quoting in turn *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)).[5]

The court below – like the Third Circuit in *Alston*, the Sixth Circuit in *Carter*, and the D.C. Circuit in *Shaw v. Marriott International, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) (cited in Law Professors Br. 3-4) – held that the interest in being free from a statutory violation is sufficient to confer standing, even if the statutory violation caused the plaintiff no actual injury. *See Shaw*, 605 F.3d at 1042 ("Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute.") (internal quotations omitted). That understanding of Article III is inconsistent with the understanding applied in *Kendall* and *Wilson*.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S STANDING JURISPRUDENCE

The Ninth Circuit's holding that respondent has standing rests on that court's erroneous belief that RESPA allows a plaintiff to sue, even in the absence of actual injury. That interpretation of the statute

---

[5] Contrary to respondent, in *Doe v. National Board of Medical Examiners*, the late Judge Becker expressly rejected the same analysis employed by the Ninth Circuit below, explaining that "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated. Although Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone." 199 F.3d at 153.

ignores the statute's requirement that a plaintiff may sue only if the fee the plaintiff paid was "involved in the violation" of RESPA, *see* Pet. 22-23, and likewise disregards the serious constitutional issue that is raised by reading the statute in that way, *see* Pet. 23-24.[6] Respondent makes no effort to defend the Ninth Circuit's reading of § 8(d)(2).

Respondent defends the Ninth Circuit's constitutional holding primarily on the ground that, because "RESPA gives [a] homebuyer a right to conflict-free referral advice," the "invasion of that statutory right is an injury conferring standing" irrespective of whether the alleged "invasion" caused any distinct harm to the plaintiff. Opp. 21-22.[7] Respondent's argument neatly frames the question: whether the allegation that a defendant violated RESPA and that

---

[6] Respondent gains no support from the statement in HUD's regulation that "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made . . . is irrelevant in determining whether the act is prohibited." 24 C.F.R. § 3500.14(g)(2). That statement, by its terms, relates to what conduct is prohibited by the statute, not whether a private party has a cause of action based on payment of a settlement fee at the state-mandated legal rate. *See id.* § 3500.14(a) ("Any violation of this section is a violation of section 8 of RESPA . . . and is subject to enforcement as such *under § 3500.19* [relating to executive branch and state enforcement].") (emphasis added).

[7] Respondent relies on *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996), for the proposition that an attorney who violates a fiduciary duty to a client cannot insist on payment for services rendered, but that does not mean that a party can sue for breach of fiduciary duty in the absence of injury. As the D.C. Circuit made clear, "forfeiture [of the attorney's fees] reflects . . . the decreased value of the representation itself" – that is, an actual injury in fact. *Id.* at 402. Here, by contrast, there is no allegation that respondent paid for "referral advice," as opposed to the title insurance policy she received and about which she had no complaint.

the violation had an arguable connection to a transaction involving the plaintiff satisfies Article III's injury-in-fact requirement in the absence of any other "distinct and palpable injury" to the plaintiff. *Gollust*, 501 U.S. at 126 (internal quotations omitted). This Court's standing cases make clear that the answer is no: unless a plaintiff is seeking "compensation" for (or to prevent) an injury to herself, she lacks standing. *Vermont Agency*, 529 U.S. at 772-73. A private individual does not gain standing simply by virtue of an interest in enforcing compliance with the law. *See Citizens for a Better Env't*, 523 U.S. at 106 (rejecting "vindication of the rule of law" as a basis for standing); *Lujan*, 504 U.S. at 573-78. The possibility that the plaintiff will recover money through an action does not alter the conclusion: such recovery is "merely a byproduct of the suit itself" and "cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, 529 U.S. at 773 (internal quotations omitted).

Respondent argues that, if economic injury is required, she can satisfy it because the "systemic effects" of the "kickbacks" alleged in the complaint have affected pricing of settlement services. Opp. 22; *see also* Opp. 8-9. The first and sufficient response to this argument is that such an injury is nowhere alleged in the complaint (and the Ninth Circuit made no mention of it); the only injury averred in the complaint (on which respondent does not attempt to rely) is that she was denied information concerning "the cost of title insurance." App. 49a. Moreover, respondent provides no clue as to how the business arrangement at issue in this case had any "systemic" effect on the prices charged for title insurance in Ohio. Respondent – relying on a GAO report – argues that

referral fees given by *title agents* to "real estate professionals" such as mortgage brokers and real estate agents leads to improper "steer[ing]" of homebuyers to a particular agency. Opp. 8; *see also* U.S. Gov't Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, GAO-07-401, at 3-4 (Apr. 2007); *Title Insurance – Cost and Competition: Hearing Before the Subcomm. on Housing & Community Opportunity of the H. Comm. on Financial Services*, 109th Cong. 31 (Apr. 26, 2006) ("For title service providers, there is an almost irresistible incentive to financially influence . . . realtors to refer them business.") (statement of Douglas Miller, President & CEO, Title One, Inc.). But the arrangement at issue here was between a title insurer and its affiliated agent and did not involve any referral fee of the sort respondent claims affects competition. Respondent does not explain how that business arrangement affected any incentives to compete either for referrals or directly for the business of consumers. A supposed injury that is "conjectural or hypothetical" cannot satisfy Article III. *Lujan*, 504 U.S. at 560 (internal quotations omitted).

III. THE QUESTIONS PRESENTED ARE OF SINGULAR IMPORTANCE TO THE INDUSTRY

"[T]he Ninth Circuit's ruling threatens a common form of business arrangement that has been accepted for decades." Am. Land Title Ass'n Br. 7. Respondent does not question that the claims of the putative nationwide class she seeks to represent threaten potentially enormous liability based on nothing more than the existence of arrangements that are well known to state and federal regulators. Such litiga-

tion inflicts enormous costs, even when the underlying claims lack merit. *See* Pet. 31. RESPA does not call for that result, and the Constitution does not permit it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

February 9, 2011

AMICUS CURIAE BRIEF

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

MICHAEL JAY SINGER
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LEONARD J. KENNEDY
General Counsel

DAVID M. GOSSETT
Assistant General Counsel

DEEPAK GUPTA
Senior Litigation Counsel
Consumer Financial Protection Bureau
Washington, D.C. 20036

QUESTION PRESENTED

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits the payment of kickbacks in exchange for referrals of "business incident to or part of a [covered] real estate settlement service." 12 U.S.C. 2607(a). Any person who pays or receives a kickback in violation of Section 2607(a) is liable "to the person or persons charged for the settlement service involved in the violation" for statutory damages "in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The question presented is as follows:

In the absence of any claim that the alleged kickback violation of RESPA affected the price, quality, or other characteristics of the settlement service provided, does a purchaser of a real estate settlement service have standing to sue under Article III of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 10
Argument:
Respondent has Article III standing to pursue the claims alleged in her complaint 12
A. Congress can by statute create "legally protected interests," the invasion of which will produce an Article III "injury" 13
B. Respondent has satisfied Article III's injury-in-fact requirement by alleging a "concrete and particularized" invasion of her legally protected interests 20
C. The violation that petitioners are alleged to have committed is closely analogous to self-dealing by a fiduciary, which has traditionally been remediable in court without proof of the violation's tangible effects 28
D. The fact that respondent sought class certification has no bearing on the Article III analysis 31
Conclusion 34

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995) 14
Arizona Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 14
Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 14

Cases—Continued: Page

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 33
Carey v. *Piphus*, 435 U.S. 247 (1978) 17
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 18
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 20
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 17
Farrar v. *Hobby*, 506 U.S. 103 (1992) 17
Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 26
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 18
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 18, 27
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 30
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 15
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 17, 20, 27, 33
Marzetti v. *Williams*, 109 Eng. Rep. 842 (K.B. 1830) 17
Massachusetts v. *EPA*, 549 U.S. 497 (2007) 15
Mayor of London v. *Mayor of Lynn*, 126 Eng. Rep. 1026 (H.L. 1796) 17
Michoud v. *Girod*, 45 U.S. (4 How.) 503 (1846) 29
Missouri v. *Jenkins*, 495 U.S. 33 (1990) 24
Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. *City of Jacksonville*, 508 U.S. 656 (1993) 14

Cases—Continued: Page

Shady Grove Orthopedic Assocs. v. *Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) 32
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 20
Sprint Commc'ns Co. v. *APCC Servs., Inc.*, 554 U.S. 269 (2008) 14
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 14, 30
Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009) .. 15
Tumey v. *Ohio*, 273 U.S. 510 (1927) 30
United States v. *Hays*, 515 U.S. 737 (1995) 14
Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 21
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 14
Warth v. *Seldin*, 422 U.S. 490 (1975) 9, 15, 18
Webb v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C. Me. 1838) 16
Wilcox v. *Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172 (1830) .. 17

Constitution, statutes, regulation and rule:

U.S. Const. Art. III ..... *passim*

Statutes, regulation and rule—Continued: Page

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376:
§ 1061(b)(7), 124 Stat. 2038 4
§ 1061(d), 124 Stat. 2039 4
§ 1062, 124 Stat. 2039-2040 4
§ 1098, 124 Stat. 2103-2104 4
§ 1100H, 124 Stat. 2113 4
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 21
Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*:
15 U.S.C. 1681c(a) 26
15 U.S.C. 1681c(g) 26
15 U.S.C. 1681c-1(a)(2) 26
15 U.S.C. 1681i(a)(1) 26
15 U.S.C. 1681n(a) 26
Homeowners Protection Act of 1998, 12 U.S.C. 4901 *et seq.*:
12 U.S.C. 4904(b) 26
12 U.S.C. 4905(c) 26
12 U.S.C. 4907(a)(2) 26
Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231 5
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.* 1
12 U.S.C. 2601(a) 2, 23
12 U.S.C. 2601(b)(2) 2, 7, 23
12 U.S.C. 2602(1) 3

Statutes, regulations and rule—Continued: Page

12 U.S.C. 2602(3) 2, 6
12 U.S.C. 2602(7) 3
12 U.S.C. 2607 ..... 4, 5, 22
12 U.S.C. 2607(a) ..... *passim*
12 U.S.C. 2607(b) 3
12 U.S.C. 2607(c) 3, 8
12 U.S.C. 2607(c)(4) 3
12 U.S.C. 2607(d) (1976) 4
12 U.S.C. 2607(d)(2) ..... *passim*
12 U.S.C. 2607(d)(2) (1976) 4
12 U.S.C. 2607(d)(4) 5
12 U.S.C. 2607(d)(5) 4
12 U.S.C. 2614 (1976) 4
12 U.S.C. 2617 3
12 U.S.C. 2617(a) 3
15 U.S.C. 1117(c) (Supp. II 2009) 26
15 U.S.C. 1679g(a)(1)(B) 26
15 U.S.C. 1693m(a)(2) 26
17 U.S.C. 504(a) 26
17 U.S.C. 504(c) 26
17 U.S.C. 911(c) 26
18 U.S.C. 2710(b) 26
18 U.S.C. 2710(c)(2)(A) 26
18 U.S.C. 2724(a) 26
18 U.S.C. 2724(b)(1) 26
28 U.S.C. 1292(b) 8, 9

Statutes, regulations and rule—Continued: Page

28 U.S.C. 1292(e) 8
29 U.S.C. 1821(a) 26
29 U.S.C. 1821(b) 26
29 U.S.C. 1831(a) 26
29 U.S.C. 1831(b) 26
29 U.S.C. 1843 26
29 U.S.C. 1854(c)(1) 26
47 U.S.C. 227(b)(1)(A)(iii) 27
47 U.S.C. 227(b)(1)(B) 27
47 U.S.C. 227(b)((3)(B) 27
47 U.S.C. 605(a) 27
47 U.S.C. 605(e)(3)(C)(i)(II) 27
24 C.F.R. Pt. 3500 ..... 3, 4
Section 3500.14(g)(2) 4, 24
Fed. R. Civ. P. 23(f) 9

Miscellaneous:

3 William Blackstone, *Commentaries on the Laws of England* (1768) 17
Dan B. Dobbs, *Handbook on the Law of Remedies* (1st ed. 1973) 17
76 Fed. Reg. (2011):
p. 43,570 4
p. 43,571 4
H.R. Rep. No. 532, 97th Cong., 2d Sess. (1982) 28
Restatement (First) of Contracts (1932) 17

Miscellaneous—Continued: Page

Restatement (First) of Torts (1934-1939) 16
Restatement (Second) of Agency (1958) 27
Restatement (Second) of Torts (1979) 16
Restatement (Second) of Trusts (1959) 29
Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983) 15, 20
J.G. Sutherland, *A Treatise on the Law of Damages* (4th ed. 1916) 17

In the Supreme Court of the United States

No. 10-708

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits kickbacks paid in return for the referral of settlement service business, and it authorizes the award of statutory damages to a person who has paid for the settlement service involved in the kickback violation. 12 U.S.C. 2607(a) and (d)(2). RESPA's private right of action provides an important supplement to the federal government's own administrative and enforcement actions. Many federal laws contain similar enforcement provisions, authorizing persons whose statutory rights have been violated to sue for statutory damages. The United States therefore has a substantial interest in the question presented. At the

Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted RESPA to protect consumers in the market for real estate "settlement services." RESPA defines the term "settlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, loan processing and underwriting, and the like. 12 U.S.C. 2602(3). Congress found that "consumers throughout the Nation" needed "greater and more timely information on the nature and costs of the settlement process" and "protect[ion] from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). Congress further determined that "significant reforms in the real estate settlement process [we]re needed to insure that consumers" received that "information" and "protect[ion]." *Ibid.*

One of RESPA's stated purposes is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. 2601(b)(2). RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. 2607(a).[1] RESPA similarly prohibits settlement service providers from collecting unearned fees, by providing that no portion of any charge for rendering a settlement service may go to any person "other than for services actually performed." 12 U.S.C. 2607(b).

RESPA specifies that its kickback and unearned-fee prohibitions shall not "be construed" to prohibit certain practices in the settlement-service industry. 12 U.S.C. 2607(c). For example, certain "affiliated business arrangements" are permissible, but only if (A) the arrangement is disclosed to "the person being referred" and "such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred" at or before the times specified by statute; (B) the "person being referred" is "not required to use any particular provider of settlement services"; and (C) the only thing of value that is received from the affiliated business arrangement, other than payments for services permitted under Section 2607(c), is a return on the ownership interest or franchise relationship. 12 U.S.C. 2607(c)(4); see 12 U.S.C. 2602(7) (defining "affiliated business arrangement").

Congress delegated to the Department of Housing and Urban Development (HUD) authority to administer RESPA, see 12 U.S.C. 2617, including the authority "to prescribe such rules and regulations" and "to make such interpretations * * * as may be necessary to achieve the [Act's] purposes," 12 U.S.C. 2617(a). The regulations promulgated under that authority are codified at 24 C.F.R. Part 3500. The regulation addressing kick-

---

[1] The criteria for identifying "federally related" loans are set forth in 12 U.S.C. 2602(1).

backs and unearned fees states that "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited." 24 C.F.R. 3500.14(g)(2).

In July 2011, HUD's consumer-protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (the Bureau). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. The Bureau has determined that it will enforce HUD's RESPA regulations (24 C.F.R. Pt. 3500), and that, pending further Bureau action, it will apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

b. RESPA initially authorized enforcement of Section 2607 only through criminal prosecutions and private civil actions "to recover damages." 12 U.S.C. 2607(d), 2614 (1976). RESPA also authorized the award of attorney's fees in "successful action[s]." 12 U.S.C. 2607(d) (1976).[2] Under that version of the statute, damages for unlawful kickbacks were determined by reference to the amount of the kickback. A person who violated the anti-kickback prohibition thus was "liable to the person * * * whose business ha[d] been referred in an amount equal to three times the value or amount of the fee or thing of value" that was given and accepted under an unlawful referral-kickback agreement. 12 U.S.C. 2607(d)(2) (1976). Similarly, any person who violated the prohibition on unearned fees was liable for three

[2] RESPA now authorizes the court to award attorney's fees and costs to "the prevailing party" in a private action under Section 2607. 12 U.S.C. 2607(d)(5).

times the unearned fee or the unearned portion of the fee. *Ibid.*

In 1983, Congress amended RESPA to authorize a consumer who filed suit under Section 2607 to recover damages calculated by reference to the "charge paid" by that consumer for the settlement service involved in the violation, rather than the amount of the kickback or the unearned fee. See Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231-1232; Resp. Br. 5-8 (discussing history behind the 1983 amendments). Section 2607's civil-remedy provision now states:

> Any person or persons who violate the prohibitions or limitations of [Section 2607] shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

12 U.S.C. 2607(d)(2). The 1983 amendments also authorized the Secretary of HUD, state attorneys general, and state insurance commissioners to bring actions to enjoin violations of Section 2607. 12 U.S.C. 2607(d)(4).

2. This case concerns several financial transactions between four entities: petitioner First American Corporation;[3] its corporate subsidiary, petitioner First American Title Insurance Company (First American Title); the Tower City Title Agency, LLC (Tower City); and respondent. See Pet. App. 50a, 53a-54a. Because the case has not yet proceeded to summary judgment, this brief takes as true the facts alleged in respondent's com-

---

[3] Because petitioner First American Financial Corporation is the successor in interest to First American Corporation (Pet. ii), this brief refers to that petitioner as First American Corporation.

plaint. See *id.* at 48a-60a; cf. Pet. Br. 9 n.7 (recognizing that this Court should decide the case on the basis of respondent's allegations).

a. Respondent entered into a contract with Tower City to serve as the settlement agent for her 2006 purchase of a home in Cleveland, Ohio. Pet. App. 53a, 57a. Under that contract, Tower City provided settlement services to respondent, *ibid.*, and it referred her to First American Title to obtain a title-insurance policy for her home. *Id.* at 54a; cf. 12 U.S.C. 2602(3). After that referral, respondent and First American Title entered into a contract for title insurance. Pet. App. 54a; cf. J.A. 109. Respondent paid $455.43 of the $728.85 premium for the contracted-for insurance, and the seller paid the rest. Pet. App. 54a.

b. First American Corporation made at least two forms of payments to Tower City in exchange for Tower City's agreement to refer its title-insurance underwriting business exclusively to First American Corporation's subsidiary, First American Title. Pet. App. 51a, 53a. First, in 1998, First American Corporation purchased a minority interest in Tower City for $2 million, which was "significantly more" than the entire agency was worth. *Id.* at 51a-52a. Second, in 2004, First American Corporation made an additional cash payment of $804,825 to Tower City. *Id.* at 52a.

Before it received the kickbacks described above, Tower City had "referred substantial title insurance business to other title insurance underwriters." Pet. App. 53a. After the kickbacks, however, Tower City "referred virtually all of its title insurance business to First American Title" based on its "exclusive agency agreement" with First American Corporation. *Ibid.*; see *id.* at 52a. Neither petitioners nor Tower City "ever

disclosed the nature of their business relationship" to respondent. *Ibid.*

3. Respondent filed this putative class action, alleging that petitioners had violated Section 2607(a) by paying kickbacks for business referrals incident to or as part of a real estate settlement service involving federally related mortgage loans. Pet. App. 48a, 58a. Respondent contended that the transactions described above constituted a "purposeful violation[]" of the anti-kickback prohibition set forth in 12 U.S.C. 2607(a). Pet. App. 48a, 57a-58a. Respondent alleged that the tainted referral deprived her of "opportunities required by federal law, such as the opportunity to compare prices on the open market." *Id.* at 52a. She further alleged that petitioners' "exclusive (and secret) referral agreements" denied her, and other similarly situated home buyers, "critical information about the cost of title insurance, in a way calculated * * * 'to increase unnecessarily the cost[s]' of title insurance." *Id.* at 49a (quoting 12 U.S.C. 2601(b)(2)). Respondent did not allege, however, that she had paid more for title insurance, or that she had received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback. See *id.* at 14a.

Petitioners moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. They argued, *inter alia*, that respondent had not been overcharged for her title insurance and therefore had not suffered any injury cognizable under RESPA or under Article III of the Constitution. Pet. App. 14a.

a. The district court denied the motion to dismiss. Pet. App. 12a-22a.

The district court first held that RESPA's "plain language" does not require proof of "overcharges" to the

consumer, but rather provides that "violators are liable for 'any charge paid' for [a] settlement service 'involved in' a violation of RESPA." Pet. App. 16a. The court found additional support for that conclusion in the statutory history and in HUD's regulations. *Id.* at 17a-18a.

The district court further held that respondent had Article III standing to pursue her claim. The court explained that Congress's 1983 amendment to RESPA "created a right to be free from referral-tainted settlement services." Pet. App. 19a. The court concluded that the facts alleged by respondent, if proved, would establish "a statutory injury fairly traceable to [petitioners'] action and redressable by a favorable decision." *Id.* at 14a, 19a.

The district court then concluded that respondent had adequately pleaded the other elements of a RESPA claim. Pet. App. 20a-21a. In particular, the court held that respondent had sufficiently alleged that petitioners paid kickbacks in exchange for referrals and did not provide the disclosure necessary to qualify for a safe harbor under Section 2607(c). *Id.* at 21a. The court recognized that petitioners had controverted those allegations, but it concluded that resolution of that dispute was "better suited for argument in a motion for summary judgment." *Ibid.*

The district court denied petitioners' request to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). J.A. 6.

b. The district court subsequently denied respondent's two motions for class certification. Pet. App. 23a-30a, 31a-40a. The court of appeals allowed respondent to pursue interlocutory appeals of the class-certification rulings. J.A. 14, 24; see 28 U.S.C. 1292(e);

Fed. R. Civ. P. 23(f).[4] Petitioners argued that the Rule 23(f) appeals should be dismissed, and that the district court lacked jurisdiction over the suit, because respondent did not have either Article III standing or statutory standing under RESPA. See J.A. 150-155, 160-162.

4. The court of appeals affirmed the district court's class-certification orders in part, reversed them in part, and remanded. Pet. App. 1a-11a. As relevant here, the court of appeals rejected petitioners' challenges to respondent's statutory and constitutional standing. *Id.* at 2a-7a.

The court of appeals held that respondent has a cause of action under RESPA whether or not the alleged kickback affected the charge she paid for her title insurance. The court stated that, under the "clear" language of Section 2607(d)(2), "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term 'any' demonstrates that charges are [not] restricted to a particular type of charge, such as an overcharge." Pet. App. 5a.

The court of appeals next explained that, when Congress enacts "statutes creating legal rights," the "invasion" of those rights may "create[] standing" if the statutes "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Pet. App. 4a (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (intervening citation omitted). The court concluded that, because RESPA confers such a right on respondent, the allegation that petitioners had violated

---

[4] Although the court of appeals later stated that "[d]efendants [*i.e.*, petitioners] brought this appeal," and that the court had appellate jurisdiction pursuant to 28 U.S.C. 1292(b), Pet. App. 2a, those statements are incorrect.

RESPA in selling respondent services made out "an injury sufficient to satisfy Article III." *Id.* at 5a; cf. *id.* at 4a (noting that the "parties disagree about the injury component [of Article III standing] only," not "causation" or "redressibility").

5. Petitioners sought this Court's review, both on the question whether respondent satisfied the statutory prerequisites for invoking RESPA's private right of action, and on the question whether allowing respondent's suit to go forward would be consistent with Article III. This Court granted the petition for a writ of certiorari limited to the second question presented. J.A. 165.

SUMMARY OF ARGUMENT

A. The dispute between the parties in this case centers on whether respondent established standing to sue by alleging a concrete and particularized invasion of a legally protected interest. Although Congress's express authorization of a particular category of suits is not dispositive, it is highly relevant to the Article III inquiry. Common-law courts have long adjudicated tort and contract suits in which the plaintiffs alleged deprivations of their legally protected interests, even when they did not allege any further consequential harms flowing from the deprivations. Consistent with that traditional understanding of the judicial role, Congress may create new legal rights, the deprivation of which gives rise to Article III standing.

B. Respondent satisfied Article III's injury-in-fact requirement by alleging a particularized violation of her statutory right to a kickback-free referral. The requirement of a "particularized" injury serves to ensure that the plaintiff has suffered some harm not shared by the citizenry at large—and, in particular, to prevent the

general public interest in observance of the laws from being treated as an individual right vindicable through a private lawsuit. Contrary to petitioners' contention, however, respondent's suit does not assert a "generalized grievance," but rather alleges a violation of *her own* statutory rights. RESPA's private right of action renders violators liable, not to any person who might wish to sue, but only "to the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Respondent's entitlement to sue thus rested on her payment of money for the settlement service in question, not simply on her opposition to the allegedly unlawful practice she complained of.

In enacting RESPA, Congress targeted practices that had the *potential* to harm consumers financially, and it limited the private right of action to plaintiffs who have been "charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Congress did not, however, make case-specific proof of consequential financial harm to the plaintiff an element of either the substantive violation or the private right of action. In its general approach, Section 2607(d)(2) is similar to private rights of action created by many other federal laws. By limiting the private right of action to persons having a sufficient nexus to the violation to be reasonably regarded as its victims, Congress respects the role of the Executive Branch as vindicator of the public interest, while providing important enforcement tools in circumstances where the tangible consequences of particular breaches are difficult to determine.

C. Congress's power to define statutory rights and authorize private suits is particularly clear when the cause of action it creates bears a close resemblance to an established category of common-law suits. RESPA's

anti-kickback prohibition serves in significant part as a conflict-of-interest rule, and the duty it imposes has close common-law analogs. At common law, a trustee who engaged in self-dealing, as by accepting payment from a third party to perform his duties in a particular way, would be subject to suit by the trust beneficiary whether or not the conflict of interest caused any harm other than the breach itself. Although RESPA does not subject real estate settlement agents to the full range of duties to which common-law fiduciaries are subject, the validity of RESPA's substantive anti-kickback rule is uncontested, and there is no reason to doubt Congress's power to authorize private enforcement of that prohibition on the same terms that similar conflict-of-interest rules have traditionally been enforced.

D. The fact that respondent sought class certification is irrelevant to the Article III analysis. If Congress is persuaded that suits like these create an untoward risk of exorbitant damages liability, it may amend RESPA's private cause of action or create additional prerequisites to class certification. The only question for this Court, however, is whether the deprivation of respondent's own statutory right to a kickback-free referral is a sufficiently concrete and particularized injury to give rise to Article III standing.

ARGUMENT

RESPONDENT HAS ARTICLE III STANDING TO PURSUE THE CLAIMS ALLEGED IN HER COMPLAINT

Respondent alleges that she received a kickback-tainted referral to a particular settlement-service provider, and that she paid money for the service she received as a result of the kickback. That nexus between respondent and the alleged violation provides a constitu-

tionally sufficient basis for Congress to authorize this suit for statutory damages. This Court has repeatedly recognized that the "actual" invasion of a "legally protected interest" will constitute an Article III injury-in-fact if it is "concrete" and "particularized." Far from raising a generalized grievance or an abstract claim of illegality, respondent alleges that *she* received tainted advice regarding a specific transaction in which *she* expended funds. Congress's power to authorize private suits in these circumstances is particularly clear because the violation that respondent alleges is closely analogous to self-dealing by a fiduciary. Courts have traditionally adjudicated suits alleging such breaches of fiduciary duty, without requiring plaintiffs to allege or prove that a particular breach caused some further consequential harm.

A. Congress Can By Statute Create "Legally Protected Interests," The Invasion Of Which Will Produce An Article III "Injury"

1. The Article III "judicial Power" of the United States extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. This Court developed the doctrine of Article III standing as "an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under that doctrine, "a party seeking to invoke a federal court's jurisdiction must demonstrate three things": "(1) 'injury in fact,' by which [the Court] mean[s] an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical'"; "(2) a causal relationship between the injury and the challenged conduct"; and "(3) a likelihood that the injury will be redressed by a favor-

able decision." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 663 (1993) (quoting *Defenders of Wildlife*, 504 U.S. at 560). The Court has recognized that historical practice "is particularly relevant to the constitutional standing inquiry since * * * Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)); see *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.").

As the case comes to this Court, the disagreement between the parties centers on the "injury in fact" component of the Article III standing requirement. Pet. App. 4a. An Article III "injury in fact" exists when three distinct requirements are satisfied. First, the asserted "injury" must constitute "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. Second, that "invasion" must be "concrete and particularized." *Ibid.* Third, the "invasion" must be "actual or imminent, not conjectural or hypothetical." *Ibid.* (citation and internal quotation marks omitted). The Court has repeatedly defined an "injury in fact" using those three criteria. See, *e.g.*, *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443 (2011); *Sprint Commc'ns Co.*, 554 U.S. at 273; *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997); *United States* v. *Hays*, 515 U.S. 737, 743 (1995); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211 (1995).

2. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Congress cannot authorize suits by plaintiffs having no particularized connection to an alleged violation by conferring upon all persons a purported "right" to have regulated parties obey the law. See *Defenders of Wildlife*, 504 U.S. at 573-574, 576-577. This Court has long recognized, however, that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 578 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), which, in turn, quotes *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Express congressional authorization of a particular category of suits "is of critical importance to the standing inquiry" because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts* v. *EPA*, 549 U.S. 497, 516-517 (2007) (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

That principle flows directly from the understanding that the "injury" Article III demands is "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. The requisite "legal injury is by definition no more than the violation of a legal right" and, of course, "legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 885 (1983) (*Doctrine of Standing*). For that reason, the "existence [of Article III standing] in a given case is largely within the control of Congress" because a plaintiff's ability to establish a cognizable "in-

jury" will "depend[] upon whether the legislature has given [her] personally a right to be free of [the challenged] action," or instead has left "enforcement" of the relevant prohibition "exclusively to public authorities." *Ibid.*

3. That understanding of Article III is consistent with traditional judicial practice. See p. 14, *supra* (noting the importance of historical practice in determining whether an Article III "case" or "controversy" exists). In tort law, for instance, an "injury" is understood to mean an "invasion of a legally protected interest." Restatement (First) of Torts § 7 cmt. a (1934-1939). Although "[t]he most usual form of injury is tangible harm," a plaintiff can have an "injury" sufficient to "maintain an action" even when "no harm is done." *Ibid.*; *id.* § 902 cmt. a.

Common-law courts have long entertained suits and awarded "nominal" damages against "a wrongdoer who has caused no harm" if he "has invaded an interest of the plaintiff protected against nonharmful conduct." Restatement (First) of Torts § 907 cmts. a and b; accord Restatement (Second) of Torts § 907 cmt. b (1979). For instance, an owner of real property can bring a trespass action for nominal damages, even if the trespass caused no actual harm. Restatement (First) of Torts §§ 158, 163, 907 cmt. b. Justice Story thus explained that one of the "elements of the common law" was that it "tolerates no farther inquiry than whether there has been the violation of a right" because "the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507-508 (C.C. Me. 1838) (No. 17,322). The same holds true in contract. "A breach of contract always creates a right of action," and when "no harm was

caused by the breach * * * judgment will be given for nominal damages." Restatement (First) of Contracts § 328 & cmt. a (1932); see, *e.g.*, *Wilcox* v. *Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 181-182 (1830); *Marzetti* v. *Williams*, 109 Eng. Rep. 842, 845 (K.B. 1830) (Lord Tenterden, C.J.).

That rule is reflected in the law of damages more generally. "Nominal damages are sometimes awarded to vindicate and judicially establish a right * * * even if no harm is done." Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191-192 (1st ed. 1973) (Dobbs); see, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266 & n.23 (1978) (citing Dobbs); see also *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992). At common law, it was therefore understood that "the right alone was essential" to sustain an action, and that "infringements of right" could be asserted without a claim of other damage because "damage to the right [was] sufficient to warrant the owner in asserting the right against the party infringing it." *Mayor of London* v. *Mayor of Lynn*, 126 Eng. Rep. 1026, 1041 (H.L. 1796) (Eyre, C.J.); see J.G. Sutherland, *A Treatise on the Law of Damages* § 9, at 31, 34 (4th ed. 1916). Early in the Nation's history, Chief Justice Marshall thus echoed Blackstone's description of this colonial-era principle: "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)).[5]

---

[5] That "general" rule, of course, is subject to exceptions. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See *Department of*

4. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), illustrates Congress's power to create rights that, if invaded, can confer standing. The Court in *Havens Realty* considered the question whether "testers"—*i.e.*, "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices"—had Article III standing to sue when they were falsely told that particular housing was unavailable. *Id.* at 373. The Court explained that Section 804(d) of the Fair Housing Act "conferred on all 'persons' a legal right to truthful information about available housing." *Ibid.* The Court further observed that an Article III injury can exist "solely" by virtue of "'statutes creating legal rights, the invasion of which creates standing,'" and that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against." *Ibid.* (quoting *Warth*, 422 U.S. at 500). The Court concluded that a tester who had "alleged injury to her statutorily created right to truthful housing information" had thereby satisfied Article III's "injury in fact" requirement. *Id.* at 374.

In concluding that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d)" had Article III standing, 455 U.S. at 373, the

---

the Army v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379-380 (1821) (Marshall, C.J.); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 562-564 (1962) (plurality opinion) (The rule "that 'the sovereign power is immune from suit'" was "'well settled and understood' at the time of the Constitutional Convention.") (citation omitted). Even within that context, however, the determination whether particular suits can go forward is subject to the control of Congress.

Court in *Havens Realty* did not suggest that Congress could authorize one plaintiff to sue regarding the provision of false information to another. To the contrary, the Court held that plaintiff Willis, who had received truthful information concerning the availability of apartments, did *not* have "standing to sue in his capacity as a tester." *Id.* at 375. The Court thus limited tester standing to specific victims of the deceptive practices Section 804(d) forbade—*i.e.*, persons who alleged that their *own* rights to truthful information had been violated. The Court's analysis made clear, however, that, so long as the plaintiff adequately alleged a deprivation of his Section 804(d) right to truthful information, Article III did not require him to allege any further consequential harm resulting from that deprivation.

To be sure, Article III places meaningful limits on the types of interests Congress may define as judicially-enforceable rights. In particular, the general public interest in compliance with (and proper enforcement of) federal law cannot "be converted into an individual right by a statute that denominates it as such." *Defenders of Wildlife*, 504 U.S. at 576. As we explain below, that principle is one aspect of the requirement that a plaintiff allege and prove "concrete and particularized" injury. As we further explain, respondent satisfied that requirement by alleging that petitioners violated the statutory rights that protect *her* in connection with a transaction in which *she* expended money. Recognition of Congress's authority to create such a cause of action in no way threatens "to transfer from the President to the courts" the general duty to enforce and administer federal law. See *id.* at 577.

B. Respondent Has Satisfied Article III's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of Her Legally Protected Interests

1. "[T]he 'injury in fact' test" described in this Court's decisions "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)). The "injury" necessary to establish Article III standing—*i.e.*, the "invasion of a legally protected interest"—therefore must be "concrete and particularized." *Id.* at 560. An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1; see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (contrasting a "concrete and particularized" injury with "a grievance the [plaintiff] suffers in some indefinite way in common with people generally") (citation and internal quotation marks omitted). As noted above, that requirement serves in part to protect the separation of powers by restraining courts from entering general disputes over the "public interest" that properly are resolved by the political Branches. *Defenders of Wildlife*, 504 U.S. at 573-574, 576-577. The "concrete injury requirement" thus reflects the understanding that "'[t]he province of the court,' as Chief Justice Marshall said in *Marbury* * * * , 'is, solely, to decide on the rights of individuals.'" *Ibid.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

This Court's decisions emphasize that the requirement of "concrete" and "particularized" injury, distinguishing the plaintiff "from the citizenry at large," is "the indispensable prerequisite of standing." Scalia, *Doctrine of Standing*, 17 Suffolk U.L. Rev. at 881-882, 895. In *Defenders of Wildlife*, for instance, the Court

held that the citizen-suit provision of the Endangered Species Act of 1973 (ESA), which stated that "any person" could bring suit to enjoin any violation of the Act, did not confer Article III standing on a plaintiff who suffered no particularized harm from an agency's alleged non-compliance with the ESA's requirements. 504 U.S. 571-578. The Court explained that, although Congress can create legal rights that give rise to standing, Congress cannot "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts." *Id.* at 577.

Similarly in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Court concluded that the plaintiffs lacked Article III standing to pursue their Establishment Clause challenge to the government's transfer to a religious college of real property in Pennsylvania, because the plaintiffs had failed to show "any personal injury suffered by them as a consequence of the alleged constitutional error." *Id.* at 485. The named plaintiffs lived in Maryland and Virginia; their organizational headquarters were in Washington, D.C.; and they learned of the transfer only through a news release. *Id.* at 487. Their suit thus was based on a "generalized grievance" that all citizens could assert, namely, the violation of an abstract "right to have the Government act in accordance with law." *Defenders of Wildlife*, 504 U.S. at 575-576.

2. The "generalized grievance" precedents discussed above would be directly on point in this case if Congress had authorized "any person" to sue whenever Section 2607(a) is violated and if respondent had filed suit simply to vindicate the public interest in having the law

obeyed. The statute that Congress actually enacted, however, requires a nexus between a Section 2607(d)(2) plaintiff and a particular RESPA violation by rendering violators of Section 2607 liable, not to "any person" who might wish to sue, but only "to the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Consistent with that requirement, respondent alleged that she had paid $455.43 of the title insurance premium charged in connection with the purchase of her home. Pet. App. 54a. Respondent further alleged that, "[p]ursuant to the Captive Title Insurance Arrangement" (the agreement that is alleged to have violated Section 2607(a)'s anti-kickback prohibition), Tower City had "referred the title insurance to First American Title, which issued both the lender and owner policies." *Ibid.*

Respondent thus alleged not simply that petitioners had violated Section 2607(a), but that *she* was the victim of the violation. Section 2607(a) conferred on respondent a statutory right to a kickback-free referral for settlement services she purchased. Petitioners' alleged violation of that right was an "invasion of a legally protected interest" that is both "concrete" and "particularized"—*i.e.*, that "affect[ed] [respondent] in a personal and individual way"—because it concerned a specific financial transaction in which respondent herself participated. See *Defenders of Wildlife*, 504 U.S. at 560 & n.1.

3. Petitioners dispute that characterization of the right that RESPA confers, arguing that the anti-kickback prohibition "protects consumers' *pecuniary* interests" rather than a broader interest in freedom from kickback-tainted referrals. Pet. Br. 40. In petitioners' view, Congress's sole concern was with "the financial injury caused when a settlement service provider

takes advantage of an unwitting customer unlawfully referred." *Id.* at 41. Petitioners contend on that basis that, unless a particular plaintiff alleges (and ultimately proves) concrete financial harm resulting from a statutory breach, he necessarily lacks standing to claim a violation of any right that Congress intended RESPA to protect. That argument is misconceived.

To be sure, Congress in enacting RESPA targeted industry practices that had the *potential* to cause financial harm to consumers. Thus, RESPA contains a congressional finding that "significant reforms in the real estate settlement process [we]re needed to insure that consumers * * * are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). Congress also identified, as one of the statute's purposes, the "elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. 2601(b)(2). In addition, RESPA requires each private plaintiff to establish a specific pecuniary nexus between himself and the alleged violation on which a suit is premised, since the private right of action is available only to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2).

Congress did not, however, make case-specific proof of consequential financial harm to the plaintiff an element of either the substantive violation or the private right of action.[6] Rather, Congress prohibited the pay-

---

[6] The court of appeals held that, under the "clear" language of Section 2607(d)(2), "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid," and that "the statutory text does not limit liability to instances in which a plaintiff is overcharged." Pet. App. 5a. Petitioners sought review of that holding, but the Court granted certiorari only on

ment of kickbacks in exchange for referrals of "business incident to or a part of a [covered] real estate settlement service" involving a federally related loan. 12 U.S.C. 2607(a); see 24 C.F.R. 3500.14(g)(2) (HUD implementing regulation explains that the fact that a kickback "does not result in an increase in any charge made" is "irrelevant in determining whether the act is prohibited"). And Congress granted any consumer who is "charged for the settlement service involved in the [kickback-referral] violation" the right to recover from the violator "three times the amount of any charge paid for such settlement service," 12 U.S.C. 2607(d)(2), without regard to the amount (if any) by which the cost of the settlement service is inflated or its quality diminished. Those provisions grant consumers a right to referrals untainted by unlawful kickbacks and, when they are charged for settlement services as to which a kickback has been paid, a remedy against those who violated their rights.[7]

---

the question whether respondent has standing under Article III. To the extent that petitioners seek to revisit the court of appeals' statutory analysis, their arguments "fall[] outside [the] limited grant of certiorari in this case" because the Court "denied certiorari on [petitioners'] first question presented." *Missouri* v. *Jenkins*, 495 U.S. 33, 53 (1990).

[7] If respondent and petitioners had included in their title insurance contract a provision stating that respondent's referral was not procured by means of a kickback, respondent would have had a contractual right to enforce that provision. Although respondent would be unable to secure more than nominal damages unless she could establish an additional injury, she would nevertheless have a cause of action in court based on that breach. See pp. 16-17, *supra*. The fact that respondent's right to a kickback-free referral was conferred by a federal statute rather than by a private agreement provides no basis for imposing a more demanding Article III inquiry. See *Defenders of Wildlife*, 504 U.S. at 576 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

Kickback schemes can often involve numerous participants and complex payment and referral arrangements, making it impossible as a practical matter to quantify and apportion the injury to a particular consumer whose settlement is linked to such a kickback. Congress could reasonably conclude that kickbacks for settlement-service referrals cause substantial aggregate harm, see American Bankers Ass'n Br. 7-8 (acknowledging that kickbacks are often passed on to consumers as "a cost of doing business"), but that Section 2607(d)(2)'s remedial and deterrent objectives would be disserved by requiring case-specific proof of such an effect. In this case, for example, petitioners argue that respondent cannot establish an overcharge because the premium she paid for title insurance reflected the standard market rate. But if unlawful kickbacks are pervasive in a particular market, the standard rate may be inflated to reflect that systemic illegal practice. Acceptance of petitioners' constitutional theory would thus render private enforcement of RESPA's anti-kickback prohibition unavailable in the very markets where that enforcement tool is most needed.

4. In its general approach, Section 2607(d)(2) is similar to private rights of action created by many other federal statutes. As an adjunct to the creation of substantive statutory rights, Congress often authorizes private suits to be filed by classes of persons whom the proscribed conduct has a natural tendency to injure. Many such laws, however, do not require proof that the feared tangible harms have actually materialized in a particular case, but rather allow awards of statutory damages to plaintiffs who establish a deprivation of the statutory right itself but do not prove any further consequential injury.

For example, federal copyright law has long authorized awards of statutory damages to copyright holders in the absence of any proof of harm other than infringement. See 17 U.S.C. 504(a) and (c); *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998) (discussing statutory damages provisions in the Copyright Act of 1790 and its state-law predecessors). The Fair Credit Reporting Act addresses more modern problems, providing statutory damages for willful violations of any of its requirements, including printing a receipt with more than the last five digits of a credit card; making a credit report that includes adverse (accurate) information older than a statutory cutoff; or failing to provide either a free reinvestigation of disputed information or a free credit report as required by statute. 15 U.S.C. 1681c(a) and (g), 1681c-1(a)(2), 1681i(a)(1), 1681n(a). And the Homeowners Protection Act of 1998 authorizes statutory damages for violations, including the unlawful failure to provide notices to mortgagors within statutory time limits. 12 U.S.C. 4904(b), 4905(c), 4907(a)(2). Other statutes that protect individuals by creating statutory rights similarly prescribe statutory damages for violations.[8]

---

[8] See, *e.g.*, 15 U.S.C. 1117(c) (Supp. III 2009) (statutory damages for use of counterfeit marks); 15 U.S.C. 1679g(a)(1)(B) (statutory refund of amount paid to organization that violates Credit Repair Organizations Act); 15 U.S.C. 1693m(a)(2) (statutory damages for failing to comply with any provision of Electronic Fund Transfer Act with respect to a consumer); 17 U.S.C. 911(c) (statutory damages for infringement of semiconductor mask work); 18 U.S.C. 2710(b) and (c)(2)(A) (liquidated damages for knowing disclosure of personally identifiable information by videotape service provider); 18 U.S.C. 2724(a) and (b)(1) (statutory damages for knowingly obtaining, disclosing, or using personal information from a motor vehicle record for purposes not permitted by statute); 29 U.S.C. 1821(a) and (b), 1831(a) and (b), 1843, 1854(c)(1)

Such private rights of action reflect a suitably restrained application of the principle that Congress may "creat[e] legal rights, the invasion of which creates standing." *Havens Realty*, 455 U.S. at 373 (internal quotation marks omitted). By limiting the right of action to persons having a sufficient nexus to the violation to be reasonably regarded as its victims, Congress avoids displacement of the Executive Branch as vindicator of the public interest, and it confines the federal courts to their assigned function of "decid[ing] on the rights of individuals." *Defenders of Wildlife*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170); see pp. 20-22, *supra*. Those provisions furnish important enforcement tools, however, in circumstances where proscribed conduct has a natural tendency to disadvantage specific categories of persons, but the tangible consequences of particular breaches are difficult to determine.

(statutory damages for intentional violations of Migrant and Seasonal Agricultural Worker Protection Act, including by failing to provide written disclosures to a migrant or seasonal agricultural worker at the time of his recruitment and by failing to display posters specifying workers' rights); 47 U.S.C. 227(b)(1)(A)(iii), (B) and (3)(B) (statutory damages for violations of the Telephone Consumer Protection Act of 1991, including by making an automatically dialed or prerecorded call to a cell phone or making a prerecorded call to a residence without consent); 47 U.S.C. 605(a) and (e)(3)(C)(i)(II) (statutory damages for unlawful disclosure of wire or radio communication).

C. The Violation That Petitioners Are Alleged To Have Committed Is Closely Analogous To Self-Dealing By A Fiduciary, Which Has Traditionally Been Remediable In Court Without Proof Of The Violation's Tangible Effects

Congress's "power to define injuries and articulate chains of causation that will give rise to a case or controversy" extends to "the articulation of new rights of action that do not have clear analogs in our common-law tradition." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Because historical practice is central to the Article III inquiry, however, Congress's power is particularly clear when the cause of action it creates *does* bear a close resemblance to an established category of common-law suits. That is the case here.

1. RESPA's anti-kickback prohibition serves in significant part as a conflict-of-interest rule that protects consumers' ability to receive dispassionate settlement-service advice. As the legislative history of amended Section 2607(d)(2) explains, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror [*sic*] or his associates have a financial interest in the company being recommended." H.R. Rep. No. 532, 97th Cong., 2d Sess. 52 (1982). The payment of an unlawful kickback thus has a natural tendency to induce referrals that disserve consumers' best interests, even though that effect may be difficult or impossible to prove in particular cases.

2. RESPA's statutory right to be free from kickback-tainted referrals has close analogs at common law. A trustee may not purchase property from his

trust, Restatement (Second) of Trusts § 170(1) & cmt. b (1959), and an agent may not take bribes from third parties, Restatement (Second) of Agency § 388 (1958). If a trustee or agent violates those duties, the courts have long entertained suits for returned fees, disgorged profits, or analogous relief with "no further inquiry" into whether the conflict of interest caused any harm other than the breach itself. See generally Resp. Br. 21-38.

In *Michoud* v. *Girod*, 45 U.S. (4 How.) 503 (1846), for example, the Court recognized that if a trustee who sells a part of the trust corpus "becomes himself interested in the purchase," the trust beneficiary would have a cause of action on the theory that the transaction was void, "without any further inquiry" into the nature of the sale or the fairness of the price. *Id.* at 553, 557. That rule, the Court explained, "embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing" and "his own individual interest." *Id.* at 559. As respondent explains (Br. 21-38), the "no further inquiry" rule predates the Founding; remains vital today; and imposes liability on both the party who breaches its duty and those that induce the breach.

3. To be sure, RESPA does not expressly designate real estate settlement service providers as "fiduciaries," and it does not impose upon such persons the full spectrum of duties to which a traditional fiduciary would be subject. Section 2607(a)'s anti-kickback prohibition, however, addresses a practice—the acceptance of payments from a third party to render particular advice to the service provider's client—that for a traditional fiduciary would be an especially egregious breach of duty. The anti-kickback prohibition is also intended, at least in significant part, to further the objectives that conflict-

of-interest rules are typically designed to serve. See pp. 24-25, 28-29, *supra*. And petitioners do not contest the authority of Congress to enact that substantive prohibition.

Once the validity of the substantive anti-kickback rule is established, there is no reason to doubt Congress's power to authorize private enforcement of that prohibition on the same terms that similar conflict-of-interest rules have traditionally been enforced. In a suit brought by a consumer who paid money for the settlement service involved in a Section 2607(a) violation, a requirement that the consumer prove an overcharge or similar economic harm would effectively preclude claims closely analogous to those that common-law courts have traditionally adjudicated. This Court's Article III jurisprudence provides no warrant for that approach. Just as suits for breach of duty implicating the "no further inquiry" rule were the "sort traditionally amenable to, and resolved by, the judicial process," *Vermont Agency of Natural Res.*, 529 U.S. at 774 (quoting *Steel Co.*, 523 U.S. at 102), so too is RESPA's cause of action for a violation of Section 2607. The close functional resemblance between Section 2607(d)(2) actions and common-law suits for breach of fiduciary duty reinforces the conclusion that respondent's suit presents a "case" or "controversy" cognizable in federal court.[9]

---

[9] In other legal contexts as well, the constitutional authority of federal courts to grant relief for violations of federal conflict-of-interest rules does not depend on proof that a violation actually affected the outcome of the conflicted person's decision. See, *e.g.*, *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-870 (1988) (affirming new-trial order based on district court's conflict of interest, without suggesting that the district court's merits rulings had been demonstrably affected by the conflict); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927)

D. The Fact That Respondent Sought Class Certification Has No Bearing On The Article III Analysis

Petitioners suggest (Br. 42-46) that respondent's theory of injury reflects an attempt to manipulate class-certification requirements, and that the potential for significant damage recoveries in class actions should inform this Court's Article III analysis. Those arguments misconceive the proper role of this Court in determining whether a particular dispute is a justiciable "case" or "controversy."

1. Petitioners speculate that "[o]ne likely reason" for respondent's failure to allege consequential economic harm "is that an individual plaintiff with a truly personal and concrete injury [such as an overcharge] * * * would have been much less adequate as a putative class representative" because her circumstances would have been less typical of the class. Pet. Br. 43. Quite apart from such strategic concerns, however, respondent had no reason to allege consequential economic harm because such harm is not an element of either the Section 2607(a) violation or the Section 2607(d)(2) cause of action. Although the question of statutory standing was contested in the proceedings below, the district court and court of appeals both resolved it in respondent's favor, and this Court denied review on that issue. See pp. 9-10, 23 n.6, *supra*. To be sure, respondent's class-action complaint understandably emphasized a feature of her legal theory that enhanced the case's potential suitability for class treatment. See Pet. App. 49a (alleg-

---

(holding that state trial judge's financial incentive to convict deprived the defendant of his right to due process of law, regardless of the strength of the evidence of guilt, because "[n]o matter what the evidence was against him, he had the right to have an impartial judge").

ing that petitioners' "exclusive (and secret) referral agreements have thus injured all members of the proposed plaintiff class in precisely the same way"). But even if this suit had been brought purely as an individual action, respondent would have had no reason to allege consequential economic injury when RESPA makes such harm irrelevant.

2. The only question presented in this case is whether a *single* plaintiff can establish an Article III injury sufficient to invoke federal jurisdiction based on a concrete and particularized invasion of her statutory right to a kickback-free referral. Petitioners dispute that they violated any such right, see Pet. Br. 45; Pet. App. 21a, and they may ultimately prevail on the merits. But if respondent's allegations are otherwise sufficient to establish a "case" or "controversy" in light of the remedial scheme that Congress has created, neither the possibility of class treatment, nor the likely magnitude of the recovery that a successful class action might produce, bears on the Judiciary's Article III power to decide respondent's claim. Cf. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (recognizing that "some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action," but concluding that this fact "has no bearing * * * on [the defendant's] or the plaintiffs' legal rights" because the potential for class certification does not affect the total liability to which the defendant is legally subject).

To be sure, *Congress* could appropriately take account of the practical concerns petitioners identify. If Congress is persuaded that suits like these create an untoward risk of exorbitant damages liability, it may address that problem either by amending RESPA's

cause of action or by creating additional prerequisites to class certification. But "the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 748 (1975), much less curtail its own traditional authority under Article III "to decide on the rights of individuals," *Defenders of Wildlife*, 504 U.S. at 576-577 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

MICHAEL JAY SINGER
CHRISTINE N. KOHL
Attorneys

LEONARD J. KENNEDY
General Counsel

DAVID M. GOSSETT
Assistant General Counsel

DEEPAK GUPTA
Senior Litigation Counsel
Consumer Financial Protection Bureau

OCTOBER 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
DEC 30 2010
OFFICE OF THE CLERK

No. 10-708

IN THE
Supreme Court of the United States

THE FIRST AMERICAN CORPORATION AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE EDWARDS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN ESCROW ASSOCIATION, CONSUMER MORTGAGE COALITION, MORTGAGE BANKERS ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, AND REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

December 30, 2010

Lit...

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 5

I. The Residential Mortgage Industry Needs A Uniform Federal Rule 5

II. RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or The Alleged Denial Of An "Impartial Referral" 7

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs 7

B. RESPA Does Not Create A Cause Of Action For The Alleged Denial Of An Impartial Referral 9

C. Construing RESPA To Create A Cause Of Action For Kickbacks Unnecessarily Increasing Costs Rather Than A Right To Impartial Referrals Avoids Article III Problems 14

D. The Court Of Appeals Misconstrued Section 2607(d)(2) 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: **PAGE**

Capell v. Pulte Mtge. L.L.C., No. 07-1901, 2007 U.S. Dist. LEXIS 82570 (E.D. Pa. Nov. 7, 2007) 9, 10

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) ..... *passim*

Carter v. Welles-Bowen Realty, Inc., 719 F. Supp. 2d 846 (N.D. Ohio 2010) 12

Finley v. United States, 490 U.S. 545 (1989) 17

Kahrer v. Ameriquest Mtge. Co., 418 F. Supp. 2d 748 (W.D. Pa. 2006) 16

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 14

Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) 15

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 6

Robinson v. Fountainhead Title Group Corp., 447 F. Supp. 2d 478 (D. Md. 2006) 16

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 14

STATUTES:

Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) & (b) 18

Fair Debt Collection Practices Act 15 U.S.C. § 1692k(a) 18

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§ 2601-2617 3

12 U.S.C. § 2601(b)(2) ..... *passim*
12 U.S.C. § 2607(a) 7, 10, 17
12 U.S.C. § 2607(b) 17
12 U.S.C. § 2607(c)(2) 7
12 U.S.C. § 2607(c)(4) 10, 11
12 U.S.C. § 2607(d) 4
12 U.S.C. § 2607(d)(2) ..... *passim*
12 U.S.C. § 2614 5

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974) 17

Truth in Lending Act of 1968, 15 U.S.C. § 1640(a) 18

CONSTITUTION:

U.S. Const. Art. III 4, 14, 15

RULES AND REGULATIONS:

24 C.F.R. § 3500, App. B. 8

24 C.F.R. § 3500.14 8

Fed. R. Civ. P. 82 6

HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements 11

Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements,

61 Fed. Reg. 29,258 (June 7, 1996) 11, 12

Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19. 1996)..... 12

LEGISLATIVE HISTORY:

H.R. Rep. No. 97-532 (1982)..... 10, 13

H.R. Rep. No. 98-123 (1983)..... 18

INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* and their members have a strong interest in the proper and consistent construction and application of existing federal statutes governing the mortgage lending industry.

The American Escrow Association is a national association of real estate settlement agents. It acts on behalf of professionals conducting all types of settlement practices throughout the United States. Its goals are to further the knowledge and professionalism of settlement agents and to educate and advise decision makers at the national level on issues of consequence to the settlement industry as a whole.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Mortgage Bankers Association (MBA) is a national association representing the real estate finance industry. It has over 2,200 members comprised of real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. It promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications.

The National Association of Realtors® is the country's largest membership organization for residential and commercial real estate agents. It provides ongoing research and education programs for its members' professional development, advocates for laws and policies that support the right to own, use, and transfer real property, and develops and promotes standards for efficient, effective, and ethical real estate business practices.

The Real Estate Services Providers Council, Inc. (RESPRO®) is a national non-profit trade association of providers from all segments of the residential home buying and financing industry,

including real estate broker-owners, mortgage lenders, title agents/underwriters, homebuilders, and financial institutions. They all offer a diversified menu of services (commonly referred to as "one-stop shopping") for home buyers and home owners through wholly-owned subsidiaries or through joint ventures with other providers, both of which are designated under the Real Estate Settlement Procedures Act as "affiliated business arrangements." One of RESPRO®'s major purposes is to educate its members on how to comply with RESPA and other relevant federal and state laws through regulatory compliance publications, an on-line Regulatory Compliance Center, and regulatory compliance seminars.

SUMMARY OF ARGUMENT

1. Certiorari should be granted to reconcile the conflicting interpretations of the Real Estate Settlement Procedures Acts ("RESPA") among the federal courts of appeals. The *amici* and their members comprise the full spectrum of businesses involved in the residential mortgage industry, many of them operate in states falling within different federal Circuits, and they should not be subject to different federal legal obligations depending on where they happen to be doing business at the time.

2. The decision below was wrongly decided because the court of appeals appears to have believed, erroneously, that RESPA bars exclusive referral agreements. Rather, RESPA bars only referral agreements based on kickbacks or the giving of another "thing of value," the presence of which will "increase unnecessarily the costs" of the settlement service being provided. 12 U.S.C. 2601(b)(2).

Because RESPA permits exclusive referral agreements, the courts that have ruled that RESPA confers on consumers a right to "impartial" referrals are incorrect. There is no right to impartial referrals; there is only a right to referrals untainted by kickbacks that unnecessarily increase settlement costs. RESPA creates a private cause of action only when the price of the referred service is increased because of the kickback – that is, when the plaintiff actually suffered economic injury.

This construction of RESPA avoids the grave constitutional issues that the court of appeals' construction raises, for Respondent's concession that she was not overcharged for and is fully satisfied with her title insurance policy disables her from establishing the concrete and individualized injury required for Article III standing.

The court of appeals reached the wrong result in this case because it failed to appreciate the role of the kickback in the statutory scheme and because it focused instead on, and misconstrued, the language of RESPA's damages provision, § 2607(d), as amended in 1983. The amendment did not change RESPA's stated and precisely focused purpose of protecting consumers from kickbacks that tend to "increase unnecessarily the costs" of settlement services (12 U.S.C. 2601(b)(2)), or create a new RESPA cause of action for non-financial harm.

REASONS FOR GRANTING THE WRIT

I.
The Residential Mortgage Industry Needs A Uniform Federal Rule

Amici represent the full spectrum of participants in the residential mortgage industry who are subject to RESPA, from mortgage companies to mortgage brokers, commercial banks, thrifts, title insurers and agents, homeowners insurance providers, real estate agents, settlement agents, and mortgage service providers of all kinds. Although many of these companies are small and hence local, many others operate regionally and/or nationally. So long as the interpretation of RESPA remains unsettled, for the same conduct undertaken in different places these companies are subject to liability for what are in effect punitive damages in the fifteen states covered by the Third, Sixth, and Ninth Circuits, not subject to liability in the six states covered by the Fifth and Seventh Circuits, and left to guess at their exposure in the remaining states. This fracturing of the legal landscape along Circuit fault lines requires the Court's attention.

In addition to subjecting the industry to conflicting standards, the current uncertainty raises questions about the proper scope of RESPA class actions and the appropriate enforcement of its prohibitions. A RESPA plaintiff must sue in the federal or state court where "the property involved is located, or where the violation is alleged to have occurred." 12 U.S.C. 2614. Attorneys seeking to represent a nationwide class of plaintiffs who suffered no economic harm will surely sue in a federal district court within the Third, Sixth, or

Ninth Circuits and include putative class members residing in Texas, Louisiana, Mississippi, Wisconsin, Illinois, and Indiana who would have no cause of action in their home courts. Absent this Court's guidance, the procedural mechanism of a class action could be used improperly to change the substantive result of those putative class members' claims. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (forbidding a state court from using the class action device to apply its law to all class members when the state has a lack of "interest" in claims unrelated to that state and its substantive law conflicted with that of other states). Moreover, Federal Rule of Civil Procedure 82 provides that "[t]hese rules [including Rule 23] do not extend or limit the jurisdiction of the district courts," yet allowing a district court to assert jurisdiction over a claim which, if brought in the plaintiff's home district court, would be beyond that court's jurisdiction, has the practical effect of extending the court's jurisdiction.

Accordingly, because the members of the residential mortgage industry need a nationally uniform interpretation of RESPA, and because the existing Circuit conflict has the potential to cause mischief in the enforcement of RESPA class actions, the Court should grant the writ.

II.

RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or The Alleged Denial Of An "Impartial Referral"

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs.

Congress expressly declared its intent in enacting RESPA: "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result * * * in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. 2601(b)(2).

Kickbacks obviously do "tend to increase unnecessarily the costs" to consumers because the service provider who pays a kickback in exchange for the referral typically treats the kickback as a cost of doing business, which it passes on to the consumer in the form of unnecessarily higher fees.

The statute refers to "fees" and "things of value" as well as kickbacks. It says that no person shall give "any fee, kickback, or thing of value pursuant to any agreement * * * that * * * a real estate settlement service * * * shall be referred to any person." § 2607(a). But the "fee" or "thing of value" must be in the nature of a kickback to create a private cause of action; *i.e.*, it must increase the service provider's cost of doing business and lead to unnecessarily higher fees to the consumer. Indeed, § 2607(c)(2) exempts "the payment * * * of a bona fide salary or compensation or other payment for

goods or facilities actually furnished or for services actually performed." A "reasonable relationship" test is used to determine whether a payment is bona fide: "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods." 24 C.F.R. § 3500.14. That is, the "excess" portion of the payment could represent a kickback that unnecessarily increased settlement costs.

Plaintiff recognizes that she must allege a kickback to recover, and she does: she says that First American overpaid for its 17 percent interest in Tower City. Pet. App. 51a-52a. Her theory is that First American in effect paid an advance kickback. Thus, instead of saying to Tower City, "I'll give you $10 for every consumer you refer to me," First American is alleged to have said something like, "Here's $100 in exchange for ten future referrals." *See id.*

The Department of Housing and Urban Development ("HUD") recognizes this point as well. Its regulations cite, as an example of a RESPA violation, the situation in which A gives settlement services at a cut rate to B, a builder, in return for B's agreement to refer home purchasers to A. 24 C.F.R. 3500, App. B. The necessary implication is that A will make up the discount by increasing its charge to home purchasers – and that, if A charged full price to B, there would be no violation even if as part of the transaction B had agreed to make the referrals.

In short, for RESPA to be violated, A must give B something undeserved, in the nature of a kickback, for in that instance A will ordinarily need to recover

what it gave to B and will do so through higher fees to its customers – *i.e.*, through an overcharge. That's what Congress meant to protect against: settlement service costs that are "unnecessarily increase[d]" by the presence of kickbacks. § 2601(b)(2).

B. RESPA Does Not Create A Cause Of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral.

Although a kickback would be expected in most cases to increase the price to the consumer, some settlement service fees are government-regulated (prohibiting the provider from raising the price) and in other instances a provider may choose not to increase the price to the consumer. In these cases the courts have considered alleged kickbacks that result in no harm, with different results (as noted above).

Some courts that hold that RESPA provides a private right of action for a kickback scheme that results in no harm to the consumer get around that problem by concluding that RESPA protects the consumer not only against referrals that unnecessarily increase costs because of kickbacks, but also referrals that, because of the presence of a kickback – even one that does not increase costs – are not "impartial." *See Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 987 (6th Cir. 2009) (cited and relied on by the court below, Pet. App. 7a); *Capell v. Pulte Mtge. L.L.C.*, No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *5 (E.D. Pa. Nov. 7, 2007).

The court of appeals in this case never clearly identified what it considered to be the RESPA

violation at issue, but it appears to have agreed with the *Carter* line of cases in accepting Respondent's claim "that her title insurance was referred to First American pursuant to an exclusive agency agreement, which * * * was illegal under RESPA." Pet. App. 3a.

To support the proposition that RESPA creates a right to impartial referrals, *Carter* and cases like it point to a House Report accompanying the 1983 amendments. *Carter*, 553 F.3d at 987; *see also* Pet. App. 6a. The Report voiced a concern about "affiliated business arrangements," under which referrals might be made without the explicit payment of kickbacks or similar fees, and lamented that the advice of the referrer in such an arrangement "may lose its impartiality" and reduce the "healthy competition generated by independent settlement service providers." H.R. Rep. No. 97-532, at 52 (1982). From that Report these few courts erroneously infer that RESPA itself creates a private cause of action "for harm to consumers beyond an increase in the cost of settlement services"; *i.e.*, that § 2607(a) "allows individuals to police the marketplace in order to ensure impartiality of referrals and competition between settlement service providers." *Carter*, 553 F.3d at 987, 988 (quoting *Capell*, 2007 U.S. Dist. LEXIS 82570, at *1).

The inference is erroneous because in fact Congress did not ban referrals that are not "impartial." On the contrary, it exempted affiliated business arrangements under § 2607(c)(4) – arrangements which may include exclusive referral agreements – provided only that the consumer is not actually required to use any particular settlement

service provider; the referrer advises the consumer of the existence of the affiliated business arrangement and provides a timely estimate of the service fees to be charged; and the company in the arrangement holding an interest in the other company receives nothing more than a return on its ownership interest – *i.e.*, no kickbacks to unnecessarily increase costs. *See* § 2607(c)(4).

HUD has issued a policy statement that expressly recognizes that exclusive referrals are permissible under RESPA. Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 *et. seq.* (June 7, 1996). HUD explained that lawful controlled business arrangements under § 2607(c)(4) consist of "a referrer of settlement service business (such as a real estate broker or real estate agent) and a recipient of referrals of business (such as a mortgage banker, mortgage broker, title agent or title company)." *Id.* at 29,259. HUD also recognized that these arrangements "may reduce costs to businesses and consumers." Thus:

> Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement service providers. In the long run, any cost savings should be passed on to consumers in most cases. Consumers may benefit

> additionally from reduced shopping time and related hassles.[2]

In determining whether the entity receiving referrals is "merely a sham arrangement used as a conduit for referral fee payments, [the Policy statement] balances a number of factors in determining whether a violation exists." *Id.* p. 29262. It enumerates ten factors, which "will be considered together." *Id.* No one is "determinative"; rather, HUD will consider all the factors "and will weigh them in light of the specific facts." *Id.* The last of the ten factors is the existence of an exclusive referral agreement. *Id.* Example #4 following the list approves an arrangement involving an exclusive agreement. *Id.* p. 29264 ("[U]pon review there appears to be nothing impermissible about these [exclusive] referrals of title business from the title agency to the title insurance company.").[3]

Similarly, § 2607(c)(1)(b) of the statute expressly permits the payment of a fee "by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance,"' and HUD has recognized that title insurance agents may make what are essentially

---

[2] HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements.

[3] *Amici* do not endorse the 1996 Policy Statement, which was promulgated without providing notice and an opportunity for comment, goes beyond the reach of the statute, and was recently held unconstitutionally vague in *Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846 (N.D. Ohio 2010). But the statement does demonstrate that, in HUD's view, exclusive referrals are permissible.

exclusive referrals to title insurance companies so long as the agent performs certain defined "core title services" for the company. *See* Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996).

Respondent herself acknowledged in the court of appeals that exclusive referral agreements are permitted by RESPA.[4] Under these agreements, service provider referrals are not "impartial" and the "healthy competition generated by independent settlement service providers" (H.R. Rep. No. 97-532, *supra*) is reduced – all as expressly permitted by RESPA.

Accordingly, the court of appeals in this case erred in believing that RESPA does not permit exclusive referral agreements (and by implication grants a cause of action for referrals that are not impartial). It is true that RESPA gives an enforceable right to consumers to receive referral services "untainted" or "[un]sullied by kickbacks," *Carter*, 553 F.3d at 989, but only kickbacks that unnecessarily increase the costs of the settlement services.

That conclusion is strongly reinforced by RESPA's limitation of its private civil remedy to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). In many real estate transactions the seller or the lender may agree to assume some or all of the closing costs.

---

[4] Reply Brief of Appellant-Petitioner, filed Apr. 20, 2009, at 2009 U.S. 9th Cir. Briefs LEXIS 735, at *3 ("title companies may have exclusive relationships with title insurers" under RESPA.).

If, for example, the appraisal in such a case was paid by the seller or lender but was tainted by a kickback, the borrower would have no remedy under § 2607(d)(2), showing that Congress meant to provide a remedy only to someone actually injured by an unnecessarily increased cost.

C. Construing RESPA To Create A Cause Of Action For Kickbacks Unnecessarily Increasing Costs Rather Than A Right To Impartial Referrals Avoids Article III Problems.

No one doubts that Congress may create new interests the invasion of which may confer Article III standing. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But not all new interests will qualify: Article III's injury-in-fact, causation, and redressability requirements must still be satisfied. *Id.* The injury-in-fact prong of the inquiry requires a showing of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). Although Article III injuries need not be financial in nature to be concrete and individualized, *id.*, they still must be concrete and individualized.[5]

Construing RESPA broadly to create a private right to an "impartial" referral for settlement services would raise serious Article III concerns, especially in a case like this one, where Respondent

---

[5] As the party invoking federal jurisdiction, Respondent bears the burden of establishing these elements. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

(a) agrees that she was not overcharged, (b) has not alleged that there is any difference between the insurance policy she received from First American and a policy she could have received from any other, competing insurer, and (c) testified that she has no complaints about First American's policy or Tower City's work and that, so long as the price was the same, she would not have cared which insurer provided her policy. *See* Pet. 6. Given these undisputed facts demonstrating Respondent's satisfaction with the service and product she received, a complaint that she received an exclusive rather than impartial referral hardly states an injury sufficiently concrete and individualized, not conjectural or hypothetical, to satisfy Article III's injury-in-fact requirement.

Moreover, given her stated satisfaction, it is hard to see how the District Court could craft a remedy that would redress the ephemeral harm she has allegedly suffered. *See Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004) ("[E]ven if Plaintiffs were correct that RESPA confers upon them a statutory right to be free of kickback-tainted transactions and that this right meets the injury-in-fact element of standing, because Plaintiffs have not alleged that [Defendant] overcharged them, the Court cannot redress Plaintiffs' alleged injury."). A monetary award to Respondent will be an award for bringing a lawsuit, not a redress of a genuine injury.

D. The Court Of Appeals Misconstrued Section 2607(d)(2).

Section 2607(d)(2) provides that "persons who violate the prohibitions or limitations of this section

shall be * * * liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." The court of appeals eschewed any analysis of what actually causes a RESPA violation. Instead, focusing only on this damages provision, it concluded that, because it does not mention an "overcharge" but instead refers to "any charge," RESPA creates a cause of action for three times the settlement service fee "[w]henever a violation * * * occurs." Pet. App. 5a. As shown above, however, no private right of action exists unless the cost of the settlement service at issue was unnecessarily increased by the giving of a kickback, fee, or thing of value in exchange for the referral. RESPA does not give consumers a right to receive only impartial referrals. The statute does not explicitly address this issue at all. Congress was concerned about whether a referral was being paid for, not whether it was impartial. Indeed, RESPA effectively allows referrals that are not impartial by permitting affiliated businesses to engage in exclusive referral agreements.

The court of appeals in this case and in *Carter* thought that the 1983 amendment to § 2607(d)(2) demonstrated Congress' intent to create a RESPA cause of action for non-financial harm. *See* Pet. App. 5a-6a; *Carter*, 553 F.3d at 987.[6] Before 1983, section

---

[6] The court below and the *Carter* court repeated and perhaps were influenced by the similar error of the District Courts in *Kahrer v. Ameriquest Mtge. Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006), and the other decisions cited in *Carter* at 553 F.3d at 983 n.2.

2607(d)(2) provided that a violator would be liable for "an amount equal to three times the value or amount of the fee or thing of value" whereas after the amendment the violator is liable for "an amount equal to three times the amount of any charge paid for such settlement service." The court below found it significant that Congress had "eliminated the 'thing of value' phrasing in the damages provision, replacing it with 'any charge paid,'" as if to say that Congress must have intended to expand the recovery of damages to cases in which no financial harm could be shown. Pet. App. 6a.

That analysis fails to appreciate that the earlier version of § 2607(d)(2) had two subsections, one establishing damages for a violation of § 2607(a) (kickbacks) and the other for a violation of § 2607(b) (fee splitting). *See* Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974). Section 2607(b) does not mention a "thing of value." Thus, when Congress in 1983 consolidated the two provisions of § 2607(d)(2) into one measure of damages for violations of both subsections (a) and (b), it necessarily removed the phrase "thing of value." Inferring a substantive change to expand the scope of recovery to cases where no financial harm may be shown contravenes this Court's caution that "'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912)).

Nothing in RESPA's language or legislative history suggests that Congress intended, in

amending the damages provision of § 2607(d)(2), to expand RESPA's reach to provide a cause of action for the denial of an impartial referral. In particular, the 1983 amendment did not change RESPA's precisely stated purpose of protecting consumers from kickbacks that "increase unnecessarily the costs" of settlement services. § 2601(b)(2).[7] Thus, even if Congress intended in the 1983 amendment to expand recoverable damages from three times the amount of the overcharge to three times the amount of the entire service charge, that does not mean that Congress meant also to create a cause of action in cases where no overcharge is alleged or provable.[8]

In sum, the court below misconstrued § 2607(d)(2) and misunderstood RESPA. If Congress had meant to give consumers the right to "impartial" referrals, it would have banned all exclusive referral agreements. Instead it explicitly permits them. Hence the reasonable conclusion is that Congress meant to create a private cause of action under RESPA only for referrals causing an increase in price

---

[7] In amending RESPA in 1983, Congress did not intend to "change current law which prohibits the payment of unearned fees, kickbacks, or other things of value in return for referrals of settlement service business." H.R. Rep. No. 98-123 at 76 (1983).

[8] A contrary construction of RESPA could lead to ruinous liability of a settlement service provider who committed a technical violation of the statute, a result that would be inconsistent with other federal consumer laws that even for nontechnical violations impose a cap on exposure. *See* 15 U.S.C. 1640(a) (Truth in Lending Act), 15 U.S.C. 1681n(a) & (b) (Fair Credit Reporting Act), 15 U.S.C. 1692k(a) (Fair Debt Collection Practices Act).

to the consumer – an overcharge – because of the accompanying kickback. When an alleged kickback does *not* cause an increase in price – as all agree is the case here – the consumer has no injury and no cause of action under RESPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

December 30, 2010

AMICUS CURIAE BRIEF

No. 10-708

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
Successor in Interest to the First American Corporation,
and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and
on Behalf of all Others Similarly Situated,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMERICAN LAND TITLE ASSOCIATION; FIDELITY NATIONAL FINANCIAL, INC.; STEWART INFORMATION SERVICES CORPORATION; AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT J. FOGARTY
Counsel of Record
DEREK E. DIAZ
HAHN, LOESER & PARKS, LLP
200 Public Square, Ste. 2800
Cleveland, Ohio 44114
(216) 621-0150
rjfogarty@hahnlaw.com
Attorneys for Amici Curiae

December 30, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. TITLE INSURANCE IS VITAL TO THE U.S. REAL ESTATE INDUSTRY	3
II. STRICT REGULATIONS CONTROL MANY ASPECTS OF THE TITLE INSURANCE BUSINESS	5
III. TITLE INSURERS OFTEN INVEST IN EXISTING TITLE AGENCIES AND CREATE EXCLUSIVE RELATIONSHIPS	6
IV. THE NINTH CIRCUIT'S RULING VASTLY COMPLICATES AMICI'S EFFORTS TO COMPLY WITH RESPA ON A NATIONAL BASIS	8
V. THE RULING BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS THIS COURT'S ATTENTION	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 8

Calhoon v. Harvey, 379 U.S. 134 (1964) 11

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 8

Durr v. Intercounty Title Co. of Ill., 14 F.3d 1183 (7th Cir. 1994) 8

Fid. Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) 10

Moore v. Radian Group, Inc., No. 02-41464 (5th Cir. May 30, 2003) 8

Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997) 9

Mullinax v. Radian Guar. Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) 9

Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978) 11

Texaco, Inc. v. Shell Oil Co., 547 U.S. 1 (2006) 11

STATUTES

18 U.S.C. § 2724(b)(1) 10

OHIO REV. CODE § 3935.07 5

TEXAS INS. CODE ANN. § 2551.003 5

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

1 JEFFREY E. THOMAS, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 2.03[1] (2009) 7

BARLOW BURKE, LAW OF TITLE INSURANCE (3d ed. 2000) 4

EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE (9th ed. 2007) 8, 9, 10, 11

HUD STATEMENT OF POLICY 1996-2, 61 Fed. Reg. 29,258 (June 7, 1996) 7

SUP. CT. R. 5(c) 9

INTEREST OF AMICI CURIAE[1]

Amici are the national trade organization for the title insurance industry and three of the nation's four largest title insurers.

Since 1907, the American Land Title Association ("ALTA") has been the national voice for the abstract and title insurance industry. Its members consist of more than 3,800 title agents, abstracters, and title insurance companies. These businesses search, review, and insure land titles to protect home buyers, real estate investors, and mortgage lenders who invest in real estate. Other real estate professionals (like attorneys, developers, builders, lenders, brokers, and surveyors) also belong to ALTA, as associate members.

Fidelity National Financial, Inc., is the largest title insurance company in the United States. It is also a leading provider of other services for real estate transactions, such as escrow. During 2008, Fidelity's title insurance companies held a 45.7% share of the U.S. title insurance market. Fidelity's

---

[1] Counsel of record for all parties received 10 days' written notice of Amici's intent to file this brief, and they have consented thereto. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no person or entity other than Amici made a monetary contribution intended to fund the preparation or submission of this brief.

customers are served by over 1,600 direct residential title offices and nearly 7,500 agents.

Stewart Information Services Corporation and its predecessors have been in the title insurance business since 1893. Today, Stewart is a technology-driven, strategically competitive real estate information and transaction management company. It provides title insurance through a network of 8,500 offices and agencies around the United States and abroad.

Old Republic National Title Insurance Company traces its beginnings to the early 1900s. Today, its parent company is one of the nation's 50 largest shareholder-owned insurance businesses. Old Republic's title insurance services are sold through a network of 242 company offices and nearly 10,000 title agents.

SUMMARY OF ARGUMENT

The petition for writ of certiorari poses questions that, if answered, would definitively resolve an important issue of federal law that has sharply divided courts around the country. Amici conduct business in nearly every jurisdiction in the nation. The current split among courts confounds Amici's efforts to comply with RESPA on a national basis.

Also, the decision below threatens with enormous, unforeseen liability two types of business

arrangements that are common in the title industry: shared-ownership entities and exclusive agents. State and federal authorities have long permitted and regulated these types of arrangements. In the wake of the Ninth Circuit's ruling, the title industry is uncertain about the on-going viability of these arrangements. Certiorari review would clarify the matter.

Finally, the Ninth Circuit's ruling reprises a lingering question of statutory construction under RESPA: whether that law confers standing on someone who suffers no monetary harm. That question looms large in the minds of real estate professionals, who could face massive liability depending on the answer.

For these reasons, Amici urge the Court to grant the petition.

ARGUMENT

I. TITLE INSURANCE IS VITAL TO THE U.S. REAL ESTATE INDUSTRY.

For nearly 150 years, title insurance has protected homeowners, lenders, and real estate investors from title defects that impair title to land. A title policy indemnifies a policy-holder "for losses caused by either on-record or off-record defects that are found in the title or interest in an insured property to have existed on the date on which the policy is issued."

BARLOW BURKE, LAW OF TITLE INSURANCE § 2.01 (3d ed. 2000).

Before a title policy is issued, a title agent searches public records for matters that may cloud ownership of the property. The search could reveal mortgages, judgments, street assessments, taxes, and the like. In nearly every real estate transaction, the title search turns up a defect that, if not corrected, would hinder the transaction. In addition, thirty-five percent of transactions require title professionals to correct errors in the public record before insuring title.

Once a title professional corrects any existing title defects and other conditions are met, a title insurance company will issue a policy. Two types of title insurance exist: owners' coverage and lenders' coverage. An Owner's Policy protects homeowners and investors from prior title defects. A Loan Policy covers a lender's interest, often a mortgage, in a piece of real estate. The policy assures the lender of the validity, priority, and enforceability of its lien. Given the desirability of that type of protection, most lenders protect their mortgages with title insurance.

After World War II, returning military personnel began to buy homes in large numbers. Title insurance grew as an industry because it gave lenders confidence in the state of title for mortgaged properties. That fueled increased investment in mortgages and led to the creation of a secondary mortgage market, through which mortgages can be bought and sold.

Today, mortgage loans on all types of real property constitute the nation's largest single category of institutional investment. By reducing the risk associated with title defects, the title insurance industry fostered that growth.

Moreover, the sheer size of the title industry makes it relevant to the national economy. For instance, in 2008, the total operating income for the entire U.S. title insurance industry was $11.3 billion.

II. STRICT REGULATIONS CONTROL MANY ASPECTS OF THE TITLE INSURANCE BUSINESS.

Virtually every state regulates title insurance extensively. For example, some states regulate title insurers through supervisory agencies with broad administrative powers. In some states, that agency will set the rates that title insurance companies can charge. *See, e.g.*, TEXAS INS. CODE ANN. § 2551.003. In other states, title insurance companies must submit rates for official approval. For example, in this case, First American Title Insurance Company charged the plaintiffs the rate mandated by an approved schedule of rates in Ohio. *See* OHIO REV. CODE § 3935.07.

That fact poses a vexing problem for a significant portion of the title industry. The plaintiffs accuse First American of inflating premiums through improper referrals in violation of RESPA. But, under Ohio law, First American had no discretion to charge

different rates. So referrals had nothing to do with the premiums that the plaintiffs paid.

Also, since the plaintiffs received the insurance that they paid for, they suffered no harm. So, even though First American charged the proper rates and issued the correct policies, it still stands accused of violating RESPA. As a result of the Ninth Circuit's ruling, other title businesses will surely be accused of the same.

III. TITLE INSURERS OFTEN INVEST IN EXISTING TITLE AGENCIES AND CREATE EXCLUSIVE RELATIONSHIPS.

In this case, the plaintiffs complain of a title insurance company's owning part of the title agency that issued the plaintiffs' title insurance policies. The plaintiffs also complain about the applicable agency contract. That contract, the plaintiffs claim, improperly called for the agent to issue policies exclusively for one title insurance company.[2]

In the title insurance industry, insurer-owned agents abound. Indeed, for over 20 years now, title insurers have routinely bought interests in existing title agencies. For instance, at one point, a subsidiary of one of the Amici, Stewart Title, tried to buy part of

---

[2] In briefing below, First American has denied that the agent's contract called for exclusivity in the way that the plaintiffs allege.

the title agency that issued the plaintiffs' title insurance policies in this case. Hundreds of other title agencies are partially or wholly owned by title insurers.

No state or federal agency has ever barred insurers from investing in existing title agencies. Rather, the U.S. Department of Housing and Urban Development ("HUD") has openly endorsed the practice. An insurer's ownership interest complies with RESPA, HUD says, as long as the insurer "pays a fair value contribution for its ownership share and receives a return on its investment that is not based on referrals of business." HUD STATEMENT OF POLICY 1996-2, 61 Fed. Reg. 29,258, 29,264 (June 7, 1996). Also, owning parts of existing insurance agencies is so common that the National Association of Insurance Commissioners created a form for insurers to report income from those arrangements.

Nor has any entity ever prohibited insurer-owned agencies from entering into an "exclusive" agency arrangement. According to HUD, "there appears to be nothing impermissible about . . . referrals of title business" in those situations. *Id.* Leading scholars have noted that insurance agents "generally serve a single insurance company – whether employed by the insurer *or exclusively contracted to it*[.]" 1 JEFFREY E. THOMAS, NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 2.03[1] (2009) (emphasis added). In this way, the Ninth Circuit's ruling threatens a common form of business arrangement that has been accepted for decades.

IV. THE NINTH CIRCUIT'S RULING VASTLY COMPLICATES AMICI'S EFFORTS TO COMPLY WITH RESPA ON A NATIONAL BASIS.

For entities that operate nationally, the decision below only sows more uncertainty into an area of law that was already muddled. Federal courts pointedly disagree about the controlling issue in this case: whether people who suffer no financial harm have standing under RESPA.

That split of authority means some title insurance businesses operate in jurisdictions in which the local circuit court has ruled *in favor of* such standing. *See, e.g.*, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 760-61 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009). Other title businesses operate in jurisdictions in which the federal circuit court has ruled the other way. *See, e.g.*, *Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf;[3] *cf. Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183, 1188 (7th Cir. 1994) (finding "no basis" for argument that RESPA liability included anything except alleged overcharge).

---

[3] Even though *Moore* is an unpublished decision, it still exemplifies the circuit split. "[A]n unpublished or summary decision on a subject over which courts of appeals have split" signals "a persistent conflict." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 263 (9th ed. 2007).

In some areas, only district courts have addressed the issue. *See, e.g.*, *Mullinax v. Radian Guar. Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004) (finding that plaintiffs "lack standing to pursue their RESPA claims"); *cf. Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1427-28 (S.D. Fla. 1997) (rejecting argument that RESPA "allows recovery of the entire title insurance and title evidence charges"). While district court rulings do not bind other federal courts, the "contrary voices of district courts obviously add to the confusion[.]" EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 257 (9th ed. 2007).

Amici, their subsidiaries, and members operate in almost every jurisdiction in the country. With federal courts reaching different conclusions about the same issue, national companies find themselves facing potential RESPA liability in some jurisdictions but not in others – for the same acts. This Court's definitive ruling would end that arbitrary disparity.

V. THE RULING BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT WARRANTS THIS COURT'S ATTENTION.

Whether unharmed people have standing to sue under RESPA represents "an important issue of federal law that has not been, but should be, settled by this Court[.]" SUP. CT. R. 5(c). In its petition, First American explained the import of that issue in

several ways. Here, Amici offer the perspective of the entire title insurance industry.

The question of whether a party has standing under a federal law absent "actual damages" presents "an important question of statutory construction[.]" *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., and Alito, J., concurring) (discussing 18 U.S.C. § 2724(b)(1)). Indeed, "a strong factor in deciding whether to grant certiorari" is whether "enormous potential liability . . . turns on a question of federal statutory interpretation[.]" 547 U.S. at 1051; *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 269 (9th ed. 2007) (noting tendency to grant certiorari when "especially large amounts of money are involved in litigation over the issue of statutory construction").

Here, the Ninth Circuit's ruling presents the very real danger of enormous liability. The plaintiffs seek treble statutory damages, which the Ninth Circuit held to be the plaintiffs' *entire* title premiums, in connection with tens of thousands of transactions. For the title industry as a whole, the decision could endanger untold millions of transactions.

Moreover, any real estate business with shared ownership – lenders, attorneys, law firms, brokers, realtors, builders – could be ensnared. In each transaction, the business would have to turn over three times its fees, plus attorneys' fees. All this potential liability rests on one question of statutory construction.

The prevalence of shared-ownership entities and exclusive agency agreements also weighs in favor of certiorari. These are "important and increasingly popular" forms of business arrangements. *Texaco, Inc. v. Shell Oil Co.*, 547 U.S. 1, 4 (2006) (noting that certiorari granted "to determine the extent to which [an anti-trust rule] applies to an important and increasingly popular form of business organization, the joint venture"); *see also Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (noting that certiorari granted due to "the importance of the issue for the agricultural community"). As a result, the issue is of considerable concern to title professionals, if not the entire real estate industry.

Finally, lower courts' split over this issue elevates the importance of certiorari review. This Court has used certiorari to resolve "conflicting views in the courts of appeals and the district courts[.]" *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964); *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 257 (9th ed. 2007) ("[T]he importance of an issue for certiorari purposes can sometimes be identified by the degree of diverse and conflicting views that lower courts . . . have expressed."). Here, faced with the same legal issue, federal courts have reached irreconcilable and diametrically-opposed results. That degree of conflict makes the issue important.

CONCLUSION

For these reasons, Amici respectfully request that the Court grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT J. FOGARTY
Counsel of Record
DEREK E. DIAZ
HAHN, LOESER & PARKS, LLP
200 Public Square, Ste. 2800
Cleveland, Ohio 44114
(216) 621-0150
rjfogarty@hahnlaw.com
Attorneys for Amici Curiae American Land Title Association; Fidelity National Financial, Inc.; Stewart Information Services Corporation; and Old Republic National Title Insurance Company

December 30, 2010

AMICUS CURIAE BRIEF

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

F. ANDREW HESSICK
1100 S. McAllister Avenue
Tempe, Arizona 85287
(480) 965-2007
(frederick.hessick@asu.edu)

December 30, 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

ARGUMENT 1

I. THIS COURT SHOULD CLARIFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III 2

A. Lower Courts Have Disagreed on Whether the Violation of a Statute Suffices for Standing 3

B. This Court Should Resolve Whether the Injury-in-Fact Test Applies to Suits Against Private Individuals 5

II. THE STANDING ISSUE IN THIS CASE IS RECURRENT AND IMPORTANT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 9

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 4, 9

Bennett v. Spear, 520 U.S. 154 (1997) 9

Betancourt v. Federated Dep't Stores, No. SA-09-CA-856-XR, 2010 WL 3199617 (W.D. Tex. Aug. 10, 2010) 7

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 4, 9

Council of Ins. Agents & Brokers v. Molasky-Arman, 522 F.3d 925 (9th Cir. 2008) 10

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 2

Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) 9

Doe v. National Bd. of Med. Examiners, 199 F.3d 146 (3d Cir. 1999) 4

Edwards v. First American Corp., 610 F.3d 514 (9th Cir. 2010) 3, 9

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) 5, 6, 8

Hein v. Freedom From Religion Found., Inc., 551 U.S. 587 (2007) 2, 3, 8

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 4, 9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 2, 5, 6, 7, 9

Marbury v. Madison, 5 U.S. (1 Cranch.) 130 (1803) 2

Massachusetts v. EPA, 549 U.S. 497 (2007) 8

Moore v. Radian Group Inc., 69 F. App'x 659 (5th Cir. 2003) (slip op. available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf) 9

Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740 (5th Cir. 2009) 5

Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) 8

Olsen v. Hegarty, 180 F. Supp. 2d 552 (D.N.J. 2001) 7

People for Ethical Treatment of Animals, Inc. v. Gittens, 396 F.3d 416 (D.C. Cir. 2005) 5

Shaw v. Marriott Int'l, Inc., 605 F.3d 1039 (D.C. Cir. 2010) 3-4, 9

Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) 2, 8

Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248 (10th Cir. 2004) 5

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 2, 6, 7, 8

Wilson v. Glenwood Intermountain Props., 98 F.3d 590 (10th Cir. 1996) 4, 7, 10

Zivotofsky ex rel. Ari Z. v. Secretary of State, 444 F.3d 614 (D.C. Cir. 2006) 4, 10

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Art. II, § 3 6

Art. III 2, 8

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 4, 9

Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* 6

Fair Housing Act, 42 U.S.C. § 3601 *et seq.* 10

Foreign Relations Authorization Act of 1972, Pub. L. No. 92-352, 86 Stat. 489 10

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* 4, 9

8 U.S.C. § 1623 10

D.C. Consumer Protection Procedures Act, D.C. Code Ann. § 28-3901 *et seq.* 9

Sup. Ct. R.:

Rule 37.2(a) 1

Rule 37.6 1

OTHER MATERIALS

Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008) 3

INTEREST OF *AMICI CURIAE*[1]

Amici are scholars who teach and write about federal courts and federal jurisdiction.[2] Although *amici* differ among themselves on the answers to the issues presented here, they are united in their belief that this case presents an unsettled constitutional question of great importance that the Court should resolve.

ARGUMENT

This case presents the question whether an individual who has not suffered an injury in fact has standing to sue in the federal courts based solely on the violation of a federal statute conferring a right of recovery on that individual. This Court has issued conflicting decisions regarding the proper resolution of this important question, and this question has divided the courts of appeals as well. Given the central role of standing in maintaining the appropriate

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the Sandra Day O'Connor College of Law, Arizona State University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

[2] The *amici* who join this brief as individuals and not as representatives of any institution with which they are affiliated are: John Bronsteen, Loyola University Chicago School of Law; Scott Dodson, Associate Professor of Law, William & Mary School of Law; Robert J. Pushaw, Jr., James Wilson Endowed Professor, Pepperdine University School of Law; Michael R. Dimino, Sr., Associate Professor, Widener University School of Law in Harrisburg, Pennsylvania; F. Andrew Hessick, Sandra Day O'Connor College of Law, Arizona State University.

division of powers among the branches of government, it is critical that the law of standing be clear. Accordingly, this Court should grant review to clarify the requirements for standing under Article III.

I. THIS COURT SHOULD CLARIFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III

Article III of the Constitution limits the federal judicial power to resolving "Cases" or "Controversies." Standing is one of the doctrines that implement this restriction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To establish standing to sue in federal court, a plaintiff must allege an "injury in fact" that is both "fairly traceable" to the defendant's alleged unlawful conduct and "likely" to be "redressed" by the requested relief. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009); *see DaimlerChrysler*, 547 U.S. at 342; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This Court has repeatedly noted that the injury-in-fact requirement, as well as the other components of standing, is a "key factor in dividing the power of government between the courts and the two political branches." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *see DaimlerChrysler*, 547 U.S. at 342 (describing standing's requirements as an "essential and unchanging part of the case-or-controversy requirement of Article III"). The requirement ensures that the judiciary stays within its "province . . . of decid[ing] on the rights of individuals." *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 130, 170 (1803)); *see Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (standing ensures that courts only "decide on the rights of individuals").

Given the critical role that standing plays in preserving the separation of powers, it is absolutely essential that this Court clearly define the requirements for standing.

A. Lower Courts Have Disagreed on Whether the Violation of a Statute Suffices for Standing

Despite the importance of a clear law of standing, the law of standing has generated substantial confusion in the lower courts. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 & n.3 (2008). One of the principal points of confusion in standing law is whether the violation of a statutory right unaccompanied by a factual injury suffices for standing. The confusion stems in large part from the role that the injury-in-fact requirement plays. As noted above, the purpose of the injury-in-fact requirement is to ensure that the federal judiciary limits itself to resolving only the "rights of individuals." *Hein*, 551 U.S. at 598. Given this role of the requirement, it is unclear whether an injury in fact is necessary in suits in which an individual alleges a violation of an individual right.

This confusion has led to disagreement in the lower courts over whether standing may be based on the violation of a right alone. Some courts of appeals, like the Ninth Circuit in this case, have held that the violation of a statutory right does provides the injury necessary for standing. *See Edwards v. First American Corp.*, 610 F.3d 514, 518 (9th Cir. 2010) ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."); *see also, e.g.*, *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir.

2010) ("[T]he violation of a statute can create the particularized injury required by Article III . . . when an individual right has been conferred on a person by statute." (internal quotation marks omitted)); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (finding standing based solely on violation of private right under RESPA); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988-89 (6th Cir. 2009) (stating that Congress "has the authority to create a right of action whose *only* injury-in-fact involves the violation of [a] statutory right"). For these courts, the injury in fact arises from the violation of the right itself. As the D.C. Circuit has explained, "[a]lthough it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute." *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 619 (D.C. Cir. 2006).

Other courts of appeals have concluded that to establish standing an individual must allege some injury in fact in addition to the violation of a statutory right. *See, e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting standing based solely on claim of breach of fiduciary duty imposed by Employee Retirement Income Security Act of 1974 (ERISA) on the ground that the injury-in-fact requirement requires some injury to result from the breach); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated."); *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 594 (10th Cir. 1996)

(stating that the denial of a right against discrimination "does not constitute injury in fact" for standing; standing requires the individual to show that he would have received "the benefit at stake in the absence of discrimination").[3]

This Court should grant review to resolve these disagreements among the circuits and provide guidance on whether standing may exist based solely on the violation of a private right, even where that violation does not result in an additional factual injury.

B. This Court Should Resolve Whether the Injury-in-Fact Test Applies to Suits Against Private Individuals

This Court should also grant review to clarify whether the injury-in-fact requirement applies in suits, such as this one, against private individuals. This Court has repeatedly made it clear that the requirement applies in suits against the government. In *Lujan*, for example, Congress had enacted a

---

[3] This issue has also arisen in the context of mootness. Mootness is the requirement of standing in a timeframe. A case becomes moot only if the plaintiff loses the interest that confers standing itself. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92 & n.5 (2000). Although most courts have concluded that a claim for nominal damages based on a violation of right unaccompanied by actual injury suffices to prevent a case from becoming moot, *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (collecting cases from Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits holding that claims for nominal damages prevent mootness), at least one judge has concluded that, to be consistent with standing law, such claims should not be justiciable, *see Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (McConnell, J., concurring); *see also People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) (noting, but not answering, the question).

citizen-suit provision conferring a right on individuals to bring a civil action to enjoin the United States to comply with the requirements of the Endangered Species Act of 1973 (ESA). *See* 504 U.S. at 571-72. The Court held that, despite this citizen-suit provision, a private individual did not have standing to force the government's compliance with the ESA unless that individual suffered an injury in fact. The Court explained that the Constitution empowers the President to ensure that the government obeys the law, and that recognizing standing for private individuals based *solely* on the right conferred through the citizen-suit provision to demand government compliance with the law would "transfer from the President to the courts the Chief Executive's . . . constitutional duty . . . to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. Const. art. II, § 3). In so holding, however, the Court expressly limited the requirement of a factual injury to suits against the government; it did not address whether this requirement applies in suits against private individuals. *See id.* at 578 ("[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.").[4]

---

[4] In *Friends of the Earth*, the Court applied the injury-in-fact test in determining whether a plaintiff had standing in a suit against private individuals. But, in doing so, the Court did not say that the injury in fact was required; it found that there was sufficient injury for standing and, therefore, did not have occasion to say whether standing would have been proper in the absence of an injury in fact. *See* 528 U.S. at 183. Nor does *Vermont Agency* resolve whether an individual must establish injury in fact, as opposed to merely a violation of right, to have standing to bring suit against another private individual. There, the Court explained that an individual's interest in obtaining a bounty for a successful *qui tam* action did not support

Lower courts have disagreed in the wake of *Lujan* whether the injury-in-fact requirement applies to suits against private individuals. *Compare, e.g.*, *Wilson*, 98 F.3d at 594 (requiring injury in fact in suits against private individuals), *with Betancourt v. Federated Dep't Stores*, No. SA-09-CA-856-XR, 2010 WL 3199617, at *15 n.6 (W.D. Tex. Aug. 10, 2010) (suggesting that the injury-in-fact requirement does not apply to suits against private individuals), *and Olsen v. Hegarty*, 180 F. Supp. 2d 552, 564 n.3 (D.N.J. 2001) (same).

Nor is it clear whether Congress should have the power to confer standing on a private individual to sue another private individual based solely on a violation of law. On the one hand, standing arguably should be strictly limited in a suit against the government, because granting standing in those suits would allow the courts to dictate to the Executive the manner in which it should enforce government compliance with the law. A suit against a private individual does not raise this concern. On the other hand, disobedience of the law does not uniquely implicate any one individual's interest; instead, ensuring obedience of the law is a public interest generally shared by the community. As this Court has explained, the Executive has the task of enforcing these public interests, and Congress cannot transfer that power to individuals. *See Lujan*, 504 U.S. at 578.

---

standing, explaining that standing requires the "violation of a legally protected right." 529 U.S. at 772.

II. THE STANDING ISSUE IN THIS CASE IS RECURRENT AND IMPORTANT

The Article III standing issues raised in this case are significantly important. Standing, as this Court has repeatedly explained, is essential to maintaining the separation of powers. *See, e.g., Vermont Agency*, 529 U.S. at 771 (describing standing as a "key factor in dividing the power of government between the courts and the two political branches"); *Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993) ("standing is . . . essential . . . to . . . the idea of separation of powers on which the Federal Government is founded") (internal quotation marks omitted); *Hein*, 551 U.S. at 598 (plurality opinion) (noting that standing is a "controlling element" to maintaining "the judiciary's proper role in our system of government"); *id.* at 636 (Scalia, J., concurring in the judgment) (noting the "vital separation-of-powers aspect of Article III standing"). Precisely defining the limits of standing is therefore critical to preserving the proper distribution of power among the Judiciary, Congress, and the Executive. Lack of clarity and ambiguity in the law of standing may lead to federal courts either inappropriately exercising power beyond the scope authorized by Article III or erroneously dismissing for lack of jurisdiction cases over which the federal courts have jurisdiction.

Confirming the importance of accurately delineating the scope of the injury-in-fact requirement are the numerous decisions that the Court has issued detailing and refining that requirement. *See, e.g., Summers*, 129 S. Ct. at 1148; *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *Friends of the Earth*, 528 U.S. at 183 (addressing whether fear of harm from

pollution constitutes injury in fact); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (considering whether general water restrictions constituted injury in fact where plaintiffs could not establish that they would receive less water); *Lujan*, 504 U.S. at 563 (addressing whether potential endangerment of species constitutes cognizable injury); *Allen v. Wright*, 468 U.S. 737, 753-56 (1984) (considering whether stigma from discrimination constitutes injury in fact). Hardly any other issue has warranted so much of this Court's resources and attention.

Moreover, these issues are recurrent. In the context of RESPA alone, four circuits have already confronted the issue whether a violation of RESPA confers standing in the absence of a factual injury caused by that violation. *See Edwards*, 610 F.3d at 518 (finding standing based solely on a violation of RESPA); *Alston*, 585 F.3d at 763 (same); *Carter*, 553 F.3d at 988-89 (same); *Moore v. Radian Group Inc.*, 69 F. App'x 659 (5th Cir. 2003) (slip op. available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf) (denying standing based "simply" on "a violation of the language of [RESPA]").

And the issue is not limited to RESPA. Congress has created countless individual rights through statute, and federal courts often face the question whether a plaintiff may assert standing based solely on the violation of those statutory rights. *See Shaw*, 605 F.3d at 1042 (considering whether standing may rest solely on violation of rights under District of Columbia Consumer Protection Procedures Act); *Kendall*, 561 F.3d at 121 (considering whether breach of duty under ERISA supports standing); *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (considering whether violation of right against discrimination

under 8 U.S.C. § 1623 confers standing); *Zivotofsky*, 444 F.3d at 619 (considering whether standing may rest solely on violation of rights under Foreign Relations Authorization Act of 1972); *Wilson*, 98 F.3d at 594 (considering whether violation of right against discrimination under Fair Housing Act suffices for standing). Nor is the issue limited to statutory rights. Courts have confronted similar standing issues for constitutional rights. *See, e.g.*, *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing.").

Accordingly, this Court should grant review to determine whether standing exists in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

F. ANDREW HESSICK
1100 S. McAllister Avenue
Tempe, Arizona 85287
(480) 965-2007
(frederick.hessick@asu.edu)

December 30, 2010

JOINT APPENDIX

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

CYRIL V. SMITH
Counsel of Record
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 332-0444
(csmith@zuckerman.com)
Counsel for Respondent

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)
Counsel for Petitioners

August 22, 2011

(Additional Counsel Listed On Inside Cover)

PETITION FOR A WRIT OF CERTIORARI FILED: NOVEMBER 23, 2010
CERTIORARI GRANTED (IN PART): JUNE 20, 2011

JEFFREY A. LAMKEN
ROBERT K. KRY
MOLO LAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2010

DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

RICHARD S. GORDON
MARTIN E. WOLF
QUINN GORDON & WOLF CHTD
102 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 825-2300
Counsel for Respondent

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399
Counsel for Petitioners

TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States District Court for the Central District of California, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) 1

United States Court of Appeals for the Ninth Circuit, *Edwards, etc. v. First Am. Corp., et al.*, No. 08-56536 14

United States Court of Appeals for the Ninth Circuit, *Edwards, etc. v. First Am. Corp., et al.*, No. 08-56538 24

Defendants' Motion To Dismiss for Lack of Subject Matter Jurisdiction and Failure To State a Claim; Memorandum of Points and Authorities, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Aug. 7, 2007) (excerpt) 34

Declaration of Samuel J. Halkias, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Aug. 7, 2007) 37

Exhibit A (Ohio Title Insurance Rating Bureau, Inc., Schedule of Rates for Title Insurance in the State of Ohio (effec. Jan. 15, 2006)) (excerpt) 40

Opposition to Defendants' Motion To Dismiss, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Aug. 21, 2007) (excerpt) 42

Defendants' Reply in Support of Motion To Dismiss, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Aug. 28, 2007) (excerpt) 58

Declaration of Richard S. Gordon re: Exhibits to Motion for Class Certification, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Sept. 25, 2007) 60

Exhibit 1 (Letter Agreement dated Oct. 23, 1998) 62

Exhibit 2 (HUD-1 Form) (excerpt) 88

Exhibit 7 (Deposition of Marilyn Mannarino (May 30, 2006)) (excerpts) 91

Declaration of Tom Wawersich, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Oct. 22, 2007) 97

Declaration of Keith Klein, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Oct. 22, 2007) 104

Exhibit 2 (Tower City Privacy Policy Statement (July 2001)) 106

Exhibit 3 (First American Privacy Policy (2001)) 109

Plaintiff's Reply Brief in Support of Motion for Class Certification, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Oct. 29, 2007) (excerpt) 112

Defendants' Answer to the Complaint, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Oct. 31, 2007) 117

Plaintiff's Motion To Alter or Amend the December 10, 2007 Order Denying Class Certification, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Apr. 1, 2008):

Exhibit C (Declaration of James Stipanovich (Feb. 18, 2008)) 129

Notice of Motion and Motion for Certification of a Tower City Class; Memorandum of Points and Authorities in Support of Thereof, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed Apr. 21, 2008) (excerpt) 136

Exhibit 5 (Deposition of Thomas R. Wawersich (Apr. 1, 2008)) (excerpts) 140

Exhibit 6 (Deposition of Todd Jones (Apr. 2, 2008)) (excerpt) 143

Declaration of Brian J. Recor in Opposition to Plaintiff's Motion for Class Certification, *Edwards, etc. v. First Am. Corp., et al.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed May 5, 2008) (excerpt) 144

Exhibit E (Deposition of Denise P. Edwards (Apr. 8, 2008)) (excerpt) 146

Motion To Dismiss for Lack of Jurisdiction, *Edwards, etc. v. First Am. Corp., et al.*, Nos. 08-56536 & 08-56538 (9th Cir. filed Nov. 10, 2008) (excerpts) 150

Defendants-Appellees' Reply in Support of Motion To Dismiss for Lack of Jurisdiction, *Edwards, etc. v. First Am. Corp., et al.*, Nos. 08-56536 & 08-56538 (9th Cir. filed Dec. 11, 2008) (excerpts) 152

Opposition of The First American Corporation and First American Title Insurance Company, Defendants-Appellees To Motion of National Association of Independent Land Title Agents For Leave To File Brief *Amicus Curiae*, *Edwards, etc. v. First Am. Corp., et al.*, Nos. 08-56536 & 08-56538 (9th Cir. filed Mar. 24, 2009):

Exhibit A (Deposition of Denise P. Edwards (Apr. 8, 2008)) (excerpt) 157

Brief for The First American Corporation and First American Title Insurance Company, Defendants-Appellees, *Edwards, etc. v. First Am. Corp., et al.*, Nos. 08-56536 & 08-56538 (9th Cir. filed Apr. 1, 2009) (excerpts) 160

Order Granting Petition for a Writ of Certiorari in Part, *First Am. Fin. Corp., etc., et al. v. Edwards*, No. 10-708 (U.S. June 20, 2011) 165

NOTICE

The following documents have been omitted in the printing of this Joint Appendix but may be found in the appendix to the petition for a writ of certiorari in this case:

Opinion of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 1a

Memorandum of the United States Court of Appeals for the Ninth Circuit, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (June 21, 2010) 8a

Order of the United States District Court for the Central District of California Denying Defendants' Motion To Dismiss, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (Oct. 11, 2007) 12a

Order of the United States District Court for the Central District of California Denying Plaintiff's Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (Dec. 10, 2007) 23a

Order of the United States District Court for the Central District of California Denying Plaintiff's Second Motion for Class Certification, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (June 6, 2008) 31a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing, *Edwards v. First Am. Corp.*, Nos. 08-56536 & 08-56538 (Aug. 30, 2010) 41a

Statutory Provisions Involved 42a

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*:

§ 2, 12 U.S.C. § 2601 ..... 42a

§ 8, 12 U.S.C. § 2607 ..... 43a

§ 12, 12 U.S.C. § 2610 ..... 47a

§ 16, 12 U.S.C. § 2614 ..... 47a

Class Action Complaint, *Edwards v. First Am. Corp.*, No. CV 07-3796 SJO (FFMx) (C.D. Cal. filed June 12, 2007) 48a

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/12/07	1	COMPLAINT against Defendants The First American Corporation, First American Title Insurance Company. (Filing fee $ 350 PAID.) Jury Demanded., filed by Plaintiff Denise P Edwards. (et) (Entered: 06/20/2007)
		* * * * *
8/7/07	29	NOTICE OF MOTION AND MOTION to Dismiss for Lack of Subject Matter Jurisdiction and Dismiss Failure to State a Claim; Memorandum of Points and Authorities filed by defendants The First American Corporation, First American Title Insurance Company. Motion set for hearing on

		9/4/2007 at 10:00 AM before Judge S. James Otero. (jp) (Entered: 08/21/2007)
8/7/07	30	DECLARATION of DOUGLAS W. KING in support of MOTION to Dismiss for Lack of Subject Matter Jurisdiction and Dismiss Failure to State a Claim 29 filed by Defendants The First American Corporation, First American Title Insurance Company. (jp) (Entered: 08/21/2007)
8/7/07	31	DECLARATION of SAMUEL J. HALKIAS filed by Defendants The First American Corporation, First American Title Insurance Company. (jp) (Entered: 08/21/2007)
		* * * * *
8/21/07	38	OPPOSITION to MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss Failure to State a Claim 29 filed by Plaintiff Denise P Edwards. (rn) (Entered: 08/29/2007)
		* * * * *
8/28/07	39	REPLY in support of MOTION to Dismiss 29; filed by defendants The First American Corporation, First American Title Insurance Company (ear) (Entered: 08/31/2007)
8/28/07	40	DECLARATION of Douglas W. King; filed by defendants The First American Corporation, First American Title Insurance Company (ear) (Entered: 08/31/2007)

9/25/07	42	NOTICE OF MOTION AND MOTION for Class Certification filed by plaintiffs' Denise P Edwards. Motion set for hearing on 11/5/2007 at 10:00 AM before Judge S. James Otero. (bp) (Entered: 09/26/2007)
9/25/07	43	DECLARATION of Richard S.Gordon and exhibits in support of MOTION to Certify Class 42 filed by Plaintiff Denise P Edwards. Volume I (bp) (Entered: 09/26/2007)
9/25/07	44	DECLARATION AND EXHIBITS IN SUPPORT OF MOTION to Certify Class 42 filed by Plaintiff Denise P Edwards. VOLUME 11 (bp) (Entered: 09/26/2007)

* * * * *

10/11/07	47	ORDER by Judge S. James Otero, re MOTION to Dismiss for Lack of Jurisdiction MOTION to Dismiss Failure to State a Claim 29. Because injury under RESPA is not limited to an overcharge and Edwards' Complaint states a claim upon which relief can be granted, defendants' motion to dismiss is Dismiss is DENIED. Defendants must answer Edwards' complaint on or before 10/31/07. (bp) (Entered: 10/12/2007)

* * * * *

10/22/07	51	MEMORANDUM in Opposition to MOTION to Certify Class 42 filed by Defendants The First American

Corporation, First American Title Insurance Company. (bp) (Entered: 10/23/2007)

10/22/07 52 DECLARATION of Tom Wawersich re MOTION to Certify Class 42 filed by Defendants The First American Corporation, First American Title Insurance Company. (bp) (Entered: 10/23/2007)

10/22/07 53 DECLARATION of Keith Klein re MOTION to Certify Class 42 filed by Defendants The First American Corporation, First American Title Insurance Company. (bp) (Entered: 10/23/2007)

* * * * *

10/29/07 60 REPLY BRIEF IN SUPPORT OF MOTION to Certify Class 42 filed by Plaintiff Denise P Edwards. (bp) (Entered: 11/01/2007)

* * * * *

10/31/07 61 ANSWER to Complaint – (Discovery) 1 filed by defendants' The First American Corporation, First American Title Insurance Company. (bp) (Entered: 11/02/2007)

* * * * *

11/8/07 67 NOTICE OF MOTION AND MOTION to Certify the 10/11/07 order for appeal, to Stay Case Proceedings pending appeal filed by defendants' The First American Corporation,

First American Title Insurance Company. Motion set for hearing on 11/20/2007 at 10:00 AM before Judge S. James Otero. (bp) (Entered: 11/16/2007)

* * * * *

11/15/07 68 MEMORANDUM in Opposition to MOTION to Certify the 10/11/07 order for appeal MOTION to Stay Case 67 filed by Plaintiff Denise P Edwards. (bp) (Entered: 11/19/2007)

* * * * *

11/20/07 73 REPLY MEMORANDUM IN SUPPORT OF MOTION to Certify the 10/11/07 order for appeal MOTION to Stay Case 67, MOTION to Certify Class 42 filed by Defendants The First American Corporation, First American Title Insurance Company. (bp) (Entered: 11/28/2007)

11/29/07 76 NOTICE OF MOTION AND MOTION to Dismiss Complaint for failure to join an indispensable party filed by Defendants The First American Corporation, First American Title Insurance Company. Motion set for hearing on 1/7/2008 at 10:00 AM before Judge S. James Otero. Lodged Notice and Motion. (rmo) (Entered: 12/13/2007)

12/10/07 74 ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION by Judge S. James Otero 42

Class Action Denied. (rmo) (Entered: 12/10/2007)

12/11/07 75 ORDER DENYING DEFENDANT'S MOTION FOR INTERLOUCTORY APPEAL by Judge S. James Otero, re MOTION to Certify the 10/11/07 order for appeal MOTION to Stay Case 67 (rmo) (Entered: 12/11/2007)

12/21/07 77 OPPOSITION to MOTION to Dismiss Complaint 76 filed by Plaintiff Denise P Edwards. (mmu) (Entered: 12/26/2007)

12/28/07 78 REPLY TO PLAINTIFF'S OPPOSITION TO MOTION to Dismiss Complaint 76 filed by Defendants The First American Corporation, First American Title Insurance Company. (bp) (Entered: 01/02/2008)

* * * * *

4/1/08 93 NOTICE OF MOTION AND MOTION to Amend Order, Util – Class Action Denied 74 filed by Plaintiff Denise P Edwards. (Spertus, James) (Entered: 04/01/2008)

4/1/08 94 EXHIBIT Exhibits A-D to MOTION to Amend Order, Util – Class Action Denied 74 93 filed by Plaintiff Denise P Edwards. (Spertus, James) (Entered: 04/01/2008)

* * * * *

4/3/08 96 ORDER by Judge S. James Otero, re ORDER DENYING PLAINTIFF'S

MOTION TO ALTER OR AMEND THE COURT'S ORDER DENYING CLASS CERTIFICATION 74 [Docket No. 93] (vcr) (Entered: 04/03/2008)

* * * * *

4/21/08 99 NOTICE OF MOTION AND MOTION to Certify Class as Tower City Class filed by Plaintiff Denise P Edwards. Motion set for hearing on 5/19/2008 at 10:00 AM before Judge S. James Otero. (Spertus, James) (Entered: 04/21/2008)

4/21/08 100 EXHIBIT 4, 5, 6, 7, 8, 10, 15 and 16 to MOTION to Certify Class as Tower City Class 99 filed by Plaintiff Denise P Edwards. (Attachments: # 1 Exhibit Vol II # 2 Exhibit Vol III # 3 Exhibit Vol. IV) (Spertus, James) (Entered: 04/21/2008)

4/21/08 101 NOTICE OF FILING EXHIBITS 1, 2, 3, 9, 11, 12, 13 AND 14 UNDER SEAL re MOTION to Certify Class as Tower City Class 99 filed by Plaintiff Denise P Edwards. (Spertus, James) (Entered: 04/21/2008)

* * * * *

5/5/08 107 MEMORANDUM in Opposition to Plaintiff's Motion for Class Certification filed by Defendants The First American Corporation, First American Title Insurance Company. (Recor, Brian) (Entered: 05/05/2008)

5/5/08	108	DECLARATION of Brian J. Recor in opposition to MOTION to Certify Class as Tower City Class 99 filed by Defendants The First American Corporation, First American Title Insurance Company. (Recor, Brian) (Entered: 05/05/2008)
5/5/08	109	DECLARATION of Todd A. Jones in opposition to MOTION to Certify Class as Tower City Class 99 filed by Defendants The First American Corporation, First American Title Insurance Company. (Recor, Brian) (Entered: 05/05/2008)
5/5/08	110	DECLARATION of Tom Wawersich in opposition to MOTION to Certify Class as Tower City Class 99 filed by Defendants The First American Corporation, First American Title Insurance Company. (Recor, Brian) (Entered: 05/05/2008)

* * * * *

5/12/08	119	REPLY In Support of MOTION to Certify Class as Tower City Class 99 filed by Plaintiff Denise P Edwards. (Attachments: # 1 Exhibit 17, 18 AND 19) (Spertus, James) (Entered: 05/12/2008)

* * * * *

5/15/08	123	SEALED DOCUMENT – DECLARATION of BRIAN J. RECOR IN OPPOSITION TO MOTION to Certify Class

		as Tower City Class 99 filed (lra) (Entered: 05/20/2008)
5/15/08	124	SEALED DOCUMENT – DECLARATION of TODD A. JONES IN OPPOSITION TO MOTION to Certify Class as Tower City Class 99 filed (lra) (Entered: 05/20/2008)

* * * * *

6/6/08	126	ORDER Denying Plaintiff's Second Motion for Class Certification 99 by Judge S. James Otero. Because the proposed class is not maintainable under Rule 23(b)(3), Edwards' Motion for Certification of a Tower City Class is DENIED. See order for further details. (csi) (Entered: 06/09/2008)

* * * * *

9/16/08	133	ORDER from 9th CCA filed, CCA # 07-80211. Respondent's motion to lift the stay of proceedings is granted. The court, in its discretion, grants the petition for permission to appeal the district court's 12/10/07 order denying class action certification. Within 10 days after the date of this order, petitioner shall perfect the appeal in accordance with Fededral Rule of Appellate Procedure 5(d). Petitioner's motion to stay all district court proceedings pending determination of this appeal is granted. Order received in this district on 9/22/08. (car) (Entered: 09/25/2008)

9/17/08	131	ORDER from 9th CCA filed, CCA # 08-80096. The court, in its discretion, grants the petition for permission to appeal the district court's 6/6/08 order denying class action certification. Within 10 days after the date of this order, petitioner shall perfect the appeal in accordance with Fededral Rule of Appellate Procedure 5(d). Petitioner's motion to stay all district court proceedings pending determination of this appeal is granted. Order received in this district on 9/16/08. (car) (Entered: 09/17/2008)
9/17/08	132	NOTIFICATION by Circuit Court of Appellate Docket Number 08-56536, CCA regarding Notice of Appeal to 9th Circuit Court of Appeals as to Plaintiff Denise P. Edwars re: USCA Order, 131 (cbr) (Entered: 09/18/2008)

* * * * *

9/24/08	136	ORDER from 9th CCA filed, CCA # 07-80211. Respondents' motion to lift the stay of proceedings is granted. The court, in its discretion, grants the petition for permission to appeal the district court's December 10, 2007 order denying class action certification. See Fed. R. Civ. P. 23(f); Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 10 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of

Appellate Procedure 5(d). Petitioner's motion to stay all district court proceedings pending determination of this appeal is granted. Order received in this district on 9/24/08. (lr) (Entered: 09/29/2008)

* * * * *

5/29/09 148 ORDER from 9th CCA filed re: Order, Util – Class Action Denied 74, Order, 126, CCA # 08-56536, 08-56538. The appellees' opposed motion to strike the addendum to the appellant's reply brief is granted. 9th Cir. R. 28-1(b). The Clerk shall strike the noted addendum. Order received in this district on 5/29/09. (lr) (Entered: 06/02/2009)

* * * * *

12/31/09 151 ORDER from 9th CCA filed, CCA # 08-56536, 08-56538. The Motion for Leave to File Brief of National Association of Independent Land Title Agents as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal is GRANTED. The brief tendered March 12, 2009 is ordered filed. Order received in this district on 6/14/2010. (lr) (Entered: 06/16/2010)

6/14/10 152 ORDER from 9th CCA filed, CCA # 08-56536, 08-56538. The addendum to Appellant's reply brief, construed as a request for judicial notice, and all related filings are DENIED. Order

received in this district on 6/14/2010. (lr) (Entered: 06/16/2010)

* * * * *

8/30/10 157 ORDER from 9th CCA filed, CCA # 08-56536 and 08-56538. "Appellants Limited Motion for Clarification, Correction and/or Panel Rehearing" is DENIED. The panel has voted to deny Appellees petition for panel rehearing. Judges Pregerson and Graber have voted to deny Appellees petition for rehearing en banc, and Judge Fletcher has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellees petition for panel rehearing and petition for rehearing en banc are DENIED. Order received in this district on 8/30/2010. (dmap) (Entered: 08/31/2010)

9/8/10 158 ORDER from 9th CCA filed, CCA # 08-56536 and 08-56538. The decision of the district court is affirmed in part; reversed in part and remanded. Order received in this district on 9/8/2010. (dmap) (Entered: 09/09/2010)

9/8/10 175 MANDATE from 9th CCA filed, CCA # 08-56536 and 08-56538. The decision of the district court is affirmed in part; reversed in part and remanded. Order received in this district on 9/8/2010. (dmap) (Entered: 10/29/2010)

* * * * *

6/22/11	319	EX PARTE APPLICATION to Stay Case pending Pending United States Supreme Court Review filed by Plaintiff Denise P Edwards. (Attachments: # 1 Proposed Order) (Spertus, James) (Entered: 06/22/2011)

* * * * *

6/29/11	322	JOINDER in EX PARTE APPLICATION to Stay Case pending Pending United States Supreme Court Review 319 filed by Defendants First American Title Insurance Company, The First American Corporation. (Scoular, Robert) (Entered: 06/29/2011)

* * * * *

7/1/11	324	MINUTES (IN CHAMBERS) by Judge S. James Otero: The parties' request for a stay pending the United States Supreme Court's decision is GRANTED 319 and this action is STAYED. A status conference is scheduled for July 9, 2012 at 8:30 A.M. The Court STAYS discovery, VACATES all current case management dates, and all pending motions are taken off calendar (Docket Nos. 240, 253, 254, 255, 306). (lc) (Entered: 07/01/2011)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56536

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/17/08	**Filed order (STEPHEN R. REINHARDT and MARSHA S. BERZON) Respondents' motion to lift the stay of proceedings is granted. The court, in its discretion, grants the petition for permission to appeal the district court's December 10, 2007 order denying class action certification. CITE. Within 10 days of this order, petitioner shall perfect the appeal in accordance with FRAP 5(d). Petitioner's motion to stay all district court proceedings pending determination of this appeal is granted. [07-80211] (GR)**

* * * * *

11/10/08 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 Motion to dismiss for lack of jurisdiction. Date of service: 11/10/2008. [6703268] [08-56536, 08-56538] (CAN)

* * * * *

12/2/08 Filed Appellant Denise P. Edwards in 08-56536, 08-56538 response opposing Motion (ECF Filing). Served on 12/01/2008. [08-56536, 08-56538] (CW)

* * * * *

12/11/08 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 reply to response (Response to Motion, Motion (ECF Filing)). Date of service: 12/11/2008. [6736279] [08-56536, 08-56538] (CAN)

1/27/09 Filed Appellant Denise P. Edwards in 08-56536, 08-56538 additional citations in opp to mtn to dismiss. Served on 01/26/2009. [08-56536, 08-56538] (CW)

1/29/09 Filed order (Appellate Commissioner) The court sua sponte consolidates these appeals. Appeal Nos. 08-56536 and 08-56538 are consolidated. Appellees' motion to dismiss the appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. See Nat'l Indus. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits

panel may consider appellate jurisdiction despite earlier denial of motion to dismiss). The following briefing schedule shall govern these consolidated appeals: the consolidated opening brief is due March 2, 2009; the consolidated answering brief is due April 1, 2009; and the consolidated optional reply brief is due within 14 days after service of the answering brief. (MOATT) [08-56536, 08-56538] (BJB)

* * * * *

3/4/09 Submitted (ECF) Opening brief for review. Submitted by Appellant Denise P. Edwards in 08-56536, 08-56538. Date of service: 03/04/2009. [6832625] [08-56536, 08-56538] (CS)

* * * * *

3/9/09 Filed Appellant Denise P. Edwards excerpts of record in 2 volumes. Served on 03/04/2009 [08-56536, 08-56538] (PK)

3/12/09 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by National Association of Independent Land Title Agents. Date of service: 03/11/2009. [6843450] [08-56536, 08-56538] (MMD)

* * * * *

3/24/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 response motion (Brief Submitted for Review (ECF Filing), motion to

become amicus, Motion (ECF Filing)). Date of service: 03/24/2009. [6857345] [08-56536, 08-56538] (CAN)

* * * * *

4/1/09 Submitted (ECF) Answering brief for review. Submitted by Appellees First American Title Insurance Company and The First American Corporation. Date of service: 04/01/2009. [6867770] (CAN)

4/1/09 Filed Appellees First American Title Insurance Company and The First American Corporation excerpts of record in 2 volumes. Served on 04/01/2009 [08-56536, 08-56538] (Volume two is filed UNDER SEAL.) (PK)

4/3/09 Filed (ECF) National Association of Independent Land Title Agents Motion to become amicus curiae. Date of service: 04/03/2009. [6871073] [08-56536, 08-56538] (MMD)

* * * * *

4/20/09 Filed (ECF) Errata to Opening Brief ([20]). Filed by Appellant Denise P. Edwards. Date of service: 4/20/09. [6888920] [08-56538, 08-56536] – [Edited 04/20/2009 by ASW] COURT CORRECTED ENTRY to update entry to show that this filing is in fact an Errata to Opening brief, not correspondence to the Court. (CS)

4/20/09 Submitted (ECF) Reply brief for review. Submitted by Appellant Denise P. Edwards in 08-56538. Date of service:

04/20/2009. [6888928] [08-56538, 08-56536] (CS)

* * * * *

7/27/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 07/27/2009. [7005314] [08-56536, 08-56538] (CAN)

7/31/09 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 Correspondence: Response to Defendants-Appellees 7/27/09 Correspondence to Court. Date of service: 07/31/2009 [7011287] [08-56536, 08-56538] – [COURT replaced document with searchable version. 07/31/2009 by MA] (CS)

* * * * *

10/13/09 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 10/13/2009. [7092581] [08-56536, 08-56538] – [COURT UPDATE: Replaced document with searchable version. 10/14/2009 by MA] (CS)

10/23/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56538, 08-56536 citation of supplemental authorities. Date of service: 10/23/2009. [7106195] [08-56538, 08-56536] (CAN)

11/4/09 Filed (ECF) Appellees First American Title Insurance Company and The First

American Corporation in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 11/04/2009. [7119299] [08-56536, 08-56538] (CAN)

12/31/09 Filed clerk order (Deputy Clerk: BJB): The Motion for Leave to File Brief of National Association of Independent Land Title Agents as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal is GRANTED. The brief tendered March 12, 2009, is ordered filed. [7180145] [08-56536, 08-56538] (BJB)

* * * * *

1/11/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 citation of supplemental authorities. Date of service: 01/11/2010. [7189684] [08-56536, 08-56538] (CS)

* * * * *

2/4/10 ARGUED AND SUBMITTED TO BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER. [7220257] [08-56536, 08-56538] (JN)

2/17/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 02/17/2010. [7234023] [08-56536, 08-56538] – [COURT UPDATE: Replaced PDF with version with firm letterhead. Resent NDA. 02/18/2010 by ASW] (CS)

2/22/10	Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536 citation of supplemental authorities. Date of service: 02/22/2010. [7239593] [08-56536, 08-56538] (CAN)
4/29/10	Filed (ECF) Appellant Denise P. Edwards in 08-56536 citation of supplemental authorities. Date of service: 04/29/2010. [7319176] [08-56536, 08-56538] (CS)
5/3/10	Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56538, 08-56536 citation of supplemental authorities. Date of service: 05/03/2010. [7322459] [08-56538, 08-56536] (CAN)
	* * * * *
6/21/10	FILED OPINION (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal. Judge: BBF, Judge: HP, Judge: SPG Authoring. FILED AND ENTERED JUDGMENT. [7379083] [08-56536, 08-56538] (PH)
6/21/10	Filed memorandum (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs. [7379098] [08-56536, 08-56538] (PH)

* * * * *

7/6/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536 petition for panel rehearing and petition for rehearing en banc (from 06/21/2010 opinion). Date of service: 07/06/2010. [7394489] [08-56536, 08-56538] (CAN)

7/6/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 petition for panel rehearing (from 06/21/2010 memorandum). Date of service: 06/21/2010. [7395009] [08-56536, 08-56538] (CS)

* * * * *

7/12/10 Filed order (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) Appellees are directed to file a response to "Appellant's Limited Motion for Clarification, Correction and/or Panel Rehearing" filed July 6, 2010. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the filed date of this order. Appellant is directed to file a response to Appellees' "Petition for Rehearing En Banc and Petition for Panel Rehearing" filed July 6, 2010. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the filed date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF

filers must file the original response plus 50 paper copies. [7401381] [08-56536, 08-56538] (BJB)

8/2/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 response to, for panel and en banc rehearing (statistical entry), for panel and en banc rehearing. Date of service: 08/02/2010. [7425399]. [08-56536, 08-56538] (CS)

8/2/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 response to, for rehearing by panel only. Date of service: 08/02/2010. [7425864]. [08-56536, 08-56538] (CAN)

8/30/10 Filed order (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) "Appellant's Limited Motion for Clarification, Correction and/or Panel Rehearing" is DENIED. The panel has voted to deny Appellees' petition for panel rehearing. Judges Pregerson and Graber have voted to deny Appellees' petition for rehearing en banc, and Judge Fletcher has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellees' petition for panel rehearing and petition for rehearing en banc are DENIED. [7456108] [08-56536, 08-56538] (BJB)

9/8/10	MANDATE ISSUED. (BBF, HP and SPG) [7466063] [08-56536, 08-56538] (SW)
12/1/10	Received notice from the Supreme Court: petition for certiorari filed on 11/30/2010. Supreme Court Number 10-708. [7564093] [08-56536, 08-56538] (SW)
6/20/11	Received letter from the Supreme Court dated 06/20/2011. [7791826] [08-56536, 08-56538] (LC)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION; FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

DOCKET PROCEEDINGS

DATE	DOCKET ENTRY
9/17/08	Filed order (STEPHEN R. REINHARDT and MARSHA S. BERZON) The court, in its discretion, grants the petition for permission to appeal the district court's June 6, 2008 order denying class action certification. CITE. Within 10 days of this order, petitioner shall perfect the appeal in accordance with FRAP 5(d). Petitioner's motion to stay all district court proceedings pending determination of this appeal is granted. (08-80096] (GR)
	* * * * *
11/10/08	Filed (ECF) Appellees First American Title Insurance Company and The First

American Corporation in 08-56536, 08-56538 Motion to dismiss for lack of jurisdiction. Date of service: 11/10/2008. [6703268] [08-56536, 08-56538] (CAN)

* * * * *

12/2/08 Filed Appellant Denise P. Edwards in 08-56536, 08-56538 response opposing Motion (ECF Filing). Served on 12/01/2008. [08-56536, 08-56538] (CW)

* * * * *

12/11/08 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 reply to response (Response to Motion, Motion (ECF Filing)). Date of service: 12/11/2008. [6736279] [08-56536, 08-56538] (CAN)

1/27/09 Filed Appellant Denise P. Edwards in 08-56536, 08-56538 additional citations in opp to mtn to dismiss. Served on 01/26/2009. [08-56536, 08-56538] (CW)

1/29/09 Filed order (Appellate Commissioner) The court sua sponte consolidates these appeals. Appeal Nos. 08-56536 and 08-56538 are consolidated. Appellees' motion to dismiss the appeal for lack of jurisdiction is denied without prejudice to renewing the arguments in the answering brief. See Nat'l Indus. v. Republic Nat'l Life Ins. Co., 677 F.2d 1258, 1262 (9th Cir. 1982) (stating that merits panel may consider appellate jurisdiction despite earlier denial of motion to

dismiss). The following briefing schedule shall govern these consolidated appeals: the consolidated opening brief is due March 2, 2009; the consolidated answering brief is due April 1, 2009; and the consolidated optional reply brief is due within 14 days after service of the answering brief. (MOATT) [08-56536, 08-56538] (BJB)

* * * * *

3/4/09 Submitted (ECF) Opening brief for review. Submitted by Appellant Denise P. Edwards in 08-56536, 08-56538. Date of service: 03/04/2009. [6832625] [08-56536, 08-56538] (CS)

* * * * *

3/9/09 Filed Appellant Denise P. Edwards excerpts of record in 2 volumes. Served on 03/04/2009 [08-56536, 08-56538] (PK)

3/12/09 Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by National Association of Independent Land Title Agents. Date of service: 03/11/2009. [6843450] [08-56536, 08-56538] (MMD)

* * * * *

3/24/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 response motion (Brief Submitted for Review (ECF Filing), motion to become amicus, Motion (ECF Filing)).

Date of service: 03/24/2009. [6857345] [08-56536, 08-56538] (CAN)

4/1/09 Filed Appellees First American Title Insurance Company and The First American Corporation excerpts of record in 2 volumes. Served on 04/01/2009 [08-56536, 08-56538] (Volume two is filed UNDER SEAL.) (PK)

4/3/09 Filed (ECF) National Association of Independent Land Title Agents Motion to become amicus curiae. Date of service: 04/03/2009. [6871073] [08-56536, 08-56538] (MMD)

* * * * *

4/20/09 Filed (ECF) Errata to Opening Brief ([20]). Filed by Appellant Denise P. Edwards. Date of service: 4/20/09. [6888920] [08-56538, 08-56536] – [Edited 04/20/2009 by ASW] COURT CORRECTED ENTRY to update entry to show that this filing is in fact an Errata to Opening brief, not correspondence to the Court. (CS)

4/20/09 Submitted (ECF) Reply brief for review. Submitted by Appellant Denise P. Edwards in 08-56538. Date of service: 04/20/2009. [6888928] [08-56538, 08-56536] (CS)

* * * * *

7/27/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 citation of supplemental au-

thorities. Date of service: 07/27/2009. [7005314] [08-56536, 08-56538] (CAN)

7/31/09 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 Correspondence: Response to Defendants-Appellees 7/27/09 Correspondence to Court. Date of service: 07/31/2009 [7011287] [08-56536, 08-56538] – [COURT replaced document with searchable version. 07/31/2009 by MA] (CS)

* * * * *

10/13/09 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 10/13/2009. [7092581] [08-56536, 08-56538] – [COURT UPDATE: Replaced document with searchable version. 10/14/2009 by MA] (CS)

10/23/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56538, 08-56536 citation of supplemental authorities. Date of service: 10/23/2009. [7106195] [08-56538, 08-56536] (CAN)

11/4/09 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 11/04/2009. [7119299] [08-56536, 08-56538] (CAN)

12/31/09 Filed clerk order (Deputy Clerk: BJB): The Motion for Leave to File Brief of National Association of Independent

Land Title Agents as Amicus Curiae in Support of Plaintiff-Appellant and in Favor of Reversal is GRANTED. The brief tendered March 12, 2009, is ordered filed. [7180145] [08-56536, 08-56538] (BJB)

* * * * *

1/11/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 citation of supplemental authorities. Date of service: 01/11/2010. [7189684] [08-56536, 08-56538] (CS)

* * * * *

2/4/10 ARGUED AND SUBMITTED TO BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER. [7220257] [08-56536, 08-56538] (JN)

2/17/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536, 08-56538 citation of supplemental authorities. Date of service: 02/17/2010. [7234023] [08-56536, 08-56538] – [COURT UPDATE: Replaced PDF with version with firm letterhead. Resent NDA. 02/18/2010 by ASW] (CS)

2/22/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536 citation of supplemental authorities. Date of service: 02/22/2010. [7239593] [08-56536, 08-56538] (CAN)

4/29/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 citation of supple-

mental authorities. Date of service: 04/29/2010. [7319176] [08-56536, 08-56538] (CS)

5/3/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56538, 08-56536 citation of supplemental authorities. Date of service: 05/03/2010. [7322459] [08-56538, 08-56536] (CAN)

* * * * *

6/21/10 FILED OPINION (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal. Judge: BBF, Judge: HP, Judge: SPG Authoring. FILED AND ENTERED JUDGMENT. [7379083] [08-56536, 08-56538] (PH)

6/21/10 Filed memorandum (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs. [7379098] [08-56536, 08-56538] (PH)

* * * * *

7/6/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536 petition for panel rehearing and petition for rehearing en banc (from 06/21/2010

opinion). Date of service: 07/06/2010. [7394489] [08-56536, 08-56538] (CAN)

7/6/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 petition for panel rehearing (from 06/21/2010 memorandum). Date of service: 06/21/2010. [7395009] [08-56536, 08-56538] (CS)

* * * * *

7/12/10 Filed order (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) Appellees are directed to file a response to "Appellant's Limited Motion for Clarification, Correction and/or Panel Rehearing" filed July 6, 2010. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the filed date of this order. Appellant is directed to file a response to Appellees' "Petition for Rehearing En Banc and Petition for Panel Rehearing" filed July 6, 2010. The response shall not exceed 15 pages or 4200 words and shall be filed within 21 days of the filed date of this order. Parties who are registered for ECF must file the response electronically without submission of paper copies. Parties who are not registered ECF filers must file the original response plus 50 paper copies. [7401381] [08-56536, 08-56538] (BJB)

8/2/10 Filed (ECF) Appellant Denise P. Edwards in 08-56536 response to, for panel and en banc rehearing (statistical

entry), for panel and en banc rehearing. Date of service: 08/02/2010. [7425399]. [08-56536, 08-56538] (CS)

8/2/10 Filed (ECF) Appellees First American Title Insurance Company and The First American Corporation in 08-56536, 08-56538 response to, for rehearing by panel only. Date of service: 08/02/2010. [7425864]. [08-56536, 08-56538] (CAN)

8/30/10 Filed order (BETTY BINNS FLETCHER, HARRY PREGERSON and SUSAN P. GRABER) "Appellant's Limited Motion for Clarification, Correction and/or Panel Rehearing" is DENIED. The panel has voted to deny Appellees' petition for panel rehearing. Judges Pregerson and Graber have voted to deny Appellees' petition for rehearing en banc, and Judge Fletcher has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Appellees' petition for panel rehearing and petition for rehearing en banc are DENIED. [7456108] [08-56536, 08-56538] (BJB)

9/8/10 MANDATE ISSUED. (BBF, HP and SPG) [7466063] [08-56536, 08-56538] (SW)

12/1/10 Received notice from the Supreme Court: petition for certiorari filed on 11/30/2010. Supreme Court Number 10-708. [7564093] [08-56536, 08-56538] (SW)

6/20/11	**Received letter from the Supreme Court dated 06/20/2011. [7791826] [08-56536, 08-56538] (LC)**

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM; MEMORANDUM OF POINTS AND AUTHORITIES

[filed Aug. 7, 2007]

---

* * * * *

MEMORANDUM OF POINTS AND AUTHORITIES

* * * * *

Furthermore, Edwards cannot allege that she paid anything more for title insurance as a result of FAC's alleged ownership interest in Tower City. Title insurance is heavily regulated by the states, including Ohio. Ohio is a rating bureau state, which allows title insurance companies to delegate their rate-filing

obligations to a rating bureau, which then files the exact same rates for all of the title insurance underwriters. *See* Ohio Rev. Code § 3935.04 (stating that insurers may satisfy rate filing obligation by becoming a member of a license rating bureau which makes such filings); Ohio Rev. Code § 3935.07 ("Every member of, or subscriber to, a rating bureau shall adhere to the filings made on its behalf by the bureau . . . ."). FATIC is a member of the Ohio Title Insurance Rating Bureau ("OTIRB") (Declaration of Samuel J. Halkias ("Halkias Decl."), ¶ 4.). So are all of FATIC's competitors in Ohio (Halkias Decl., ¶ 5). OTIRB has filed a rate manual with the Ohio Department of Insurance, and all of the title insurance companies must charge rates the OTIRB files on their behalf (Halkias Decl., ¶¶ 6-7; Ohio Rev. Code §§ 3935.04, 3935.07).

* * * * *

Dated: August 7, 2007

BRYAN CAVE LLP
Charles A. Newman
Joel D. Siegel

By: /s/ JOEL SIEGEL
Joel Siegel

STEVENS AND O'CONNELL LLP
Charles J. Stevens
400 Capitol Mall, Suite 1400
Sacramento, California
95814-4498
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

Attorneys for Defendants
THE FIRST AMERICAN CORPORATION; and
FIRST AMERICAN TITLE INSURANCE COMPANY

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF SAMUEL J. HALKIAS

[filed Aug. 7, 2007]

State of Ohio)
) SS.
County of Franklin)

Samuel. J. Halkias makes this declaration in support of First American's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

1. My name is Samuel J. Halkias. I am Vice President and Ohio Agency Operations Manager for First American Title Insurance Company. I have been employed in that capacity at First American for

nine years, and I have been employed with First American since 1987.

2. I am familiar with the filing and approval of title insurance rates with the Ohio Department of Insurance and with the operations of the Ohio Title Insurance Rating Bureau ("OTIRB").

3. A true and correct copy of the OTIRB rate manual that was in effect on September 29, 2006, when plaintiff Denise Edwards alleges she purchased a home in Cleveland, Ohio, is attached hereto as Exhibit A.

4. First American Title Insurance Company is a member of OTIRB.

5. All of the other title insurance underwriters licensed to issue policies on Ohio property are also members of OTIRB, specifically including Stewart Title Guaranty Company, Old Republic National Title Insurance Company, and United General Title Insurance Company.

6. All of the members of OTIRB are required to follow the same rates for the premiums on title insurance policies issued on Ohio property.

7. The premium chargeable by a title insurance agent, such as Tower City Title Agency, would be the same under the OTIRB manual regardless of whether that agent issued a policy underwritten by First American Title Insurance Company or any other title insurance underwriter doing business in Ohio.

8. Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct under penalties of perjury of the laws of the United States.

Executed on:
August 6th, 2007

/s/ SAMUEL J. HALKIAS
Samuel J. Halkias

BRYAN CAVE LLP
Charles A. Newman
Douglas W. King
Joel D. Siegel
Darci F. Madden

By: /s/ JOEL SIEGEL
Joel Siegel

STEVENS AND O'CONNELL LLP
Charles J. Stevens
Bradley Benbrook
400 Capitol Mall, Suite 1400
Sacramento, California 95814-4498
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

Attorneys for Defendants
THE FIRST AMERICAN CORPORATION; and
FIRST AMERICAN TITLE INSURANCE COMPANY

EXHIBIT A

SCHEDULE OF RATES FOR TITLE INSURANCE IN THE STATE OF OHIO

EFFECTIVE AS TO ORDERS RECEIVED ON OR AFTER JANUARY 15, 2006

OHIO TITLE INSURANCE RATING BUREAU, INC.
2941 DONNYLANE BOULEVARD
COLUMBUS, OHIO 43235

* * * * *

OHIO TITLE INSURANCE RATING BUREAU

SECTION 2

GENERAL PROVISIONS

GP-1. The general provisions, rules, rates and forms contained herein are in compliance with Ohio Revised Code Sections 3935.04 and 3953.28.

GP-2. The effective date of the general provisions, rules and rates was October 1, 2004.

GP-3. The rates set forth herein shall be observed by all policy issuing agents and offices of an Insurer.

GP-4. **The rates set forth herein do not include any charge made for title search, title examination, closing, or escrow services performed by the Insurer, or any of its approved attorneys or agents. Charges made for such services are in addition to the rates and charges set forth herein.**

* * * * *

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[filed Aug. 21, 2007]

---

* * * * *

III. ARGUMENT

A. Defendants' Motion to Dismiss Was Untimely Filed

The Complaint was filed on June 12, 2007 and served upon both Defendants on June 27. Defendants had until July 17, 2007 to answer or otherwise respond to the Complaint. On August 3, 2007, Defendants filed an Ex Parte Application for Extension of Time to Respond to the Complaint. On August 8, 2007, this Court denied Defendants' Ex Parte Appli-

cation. The same day, Defendants filed and served their Motion to Dismiss. The Motion to Dismiss was thus untimely filed and should be denied.

B. Congress Has Expressly Granted Plaintiffs Standing to Sue

1. Plaintiffs Have Satisfied the Constitutional Standing Requirements

Defendants' standing arguments focus on the requirement that a party "show he personally has suffered some actual or threatened injury," as required by Article III. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). The purpose of the constitutional standing doctrine is narrow. It "aids the federal judiciary to avoid intruding impermissibly upon the powers vested in the executive and legislative branches, by preventing courts from issuing advisory opinions not founded upon the facts of a controversy between truly adverse parties." *Scott v. Pasadena Unified School District*, 306 F.3d 646, 654 (9th Cir. 2002) (citing *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947)).

In evaluating Defendants' standing arguments at this early stage of the case, when the parties have had no opportunity to conduct discovery, "general factual allegations may suffice, for on a motion to dismiss [for lack of standing] we 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Defendants may prevail on the issue of standing only if the allegations in the Complaint are insufficient as a matter of law to demonstrate an actual controversy between truly adverse parties.

The Complaint alleges several facts that establish the requisite controversy. First, as opposed to plaintiffs who merely speculate that they may be subject to future harm, Named Plaintiff Edwards and the putative class members actually purchased title insurance through title agencies owned in part by First American. Compl. ¶ 4. Second, those title agencies were all bound by contracts that required them to act as exclusive agents for First American Title. In other words, all of their title insurance underwriting would be performed by First American Title, to the exclusion of other insurance underwriters. *Id.* Prior to 1998, Tower City had non-exclusive agency relationships with at least four underwriters – now, the kickbacks require the use of First American. *Id.* ¶ 20. Thus, Plaintiffs were prevented from choosing their title insurer once they elected to do business with Tower City.

Third, Plaintiffs allege that Defendants' sham purchase of minority ownership interests in the agencies in exchange for exclusive referral agreements constituted illegal kickbacks prohibited by RESPA. *Id.* ¶ 39. As a result, Defendants' actions provided Named Plaintiff Edwards and others with a right created by Congress and expressly protected by federal law: the right to purchase title insurance in a transaction that was not the result of an illegal kickback or referral fee. 12 U.S.C. § 2607(a).

If Plaintiffs can demonstrate that Defendants' conduct was prohibited by RESPA, these allegations, without more, are sufficient to establish a concrete and particularized injury for standing purposes. Violations of rights created by statute are sufficient to meet the injury requirement of standing. "Congress may create a statutory right or entitlement the

alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) ("The actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."); *Beeman v. TDI Managed Care Services*, 449 F.3d 1035, 1039 (9th Cir. 2006) ("When the legislature is the source of the purportedly violated legal obligation, we look to the statute to define the injury.") (citation omitted).

Congress enacted RESPA in 1974 not only to ensure that consumers were "protected from unnecessarily high settlement charges" that resulted from "abusive practices," 12 U.S.C. § 2601, but also to give consumers "the right, enforceable by a private right of action for statutory damages, to purchase settlement services from companies that have not participated in a kickback scheme." *Kahrer v. Ameriquest Mortgage Company, supra*, 418 F. Supp. 2d at 756 (quoting *Patton v. Triad Guaranty Insurance Corp.*, No. CV100-132 (S.D. Ga. October 10, 2002) (unpublished), slip op. at 5-6 (copy attached as Exhibit A)).

> The purpose of a private right of action under RESPA is not to provide a remedy for individual consumers who think that they are paying too much for settlement services and prefer litigation to the regulatory process. The purpose of the statute is to prevent certain practices that are harmful to all consumers by establishing that consumers have a right not to be subjected to those practices and providing both public and

private remedies for violations of that right. [*Patton*, slip op. at 12.]

Defendants' reliance on *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 457 F.3d 941 (9th Cir. 2006), Mem. 8, is misplaced. The plaintiffs there challenged the NRC's failure to prepare an environmental impact statement before issuing a final rule – a purely procedural injury. Here, by contrast, the "interest protected by the procedural rule," 457 F.3d at 952, is the assurance that the settlement process will be free from bribery. Far from asserting an injury stemming from an agency's failure to follow procedure, Plaintiffs here were injured by Defendants' violation of the substantive right created by RESPA – they were personally deprived of the right to procure settlement services untainted by illegal kickbacks.

If a plaintiff can demonstrate a violation of the Act – a title insurance transaction related to an illegal kickback – then traceability and redressability, the second and third requirements of standing under Article III, are also satisfied. Section 2607 of RESPA limits relief to persons "charged for settlement services involved in the violation" of that section. Redressability flows from the fact that persons paying or receiving illegal kickbacks or referral fees are likely to be deterred by the assessment of statutory damages. *Cf. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000) ("To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, [civil penalties for violations of the Clean Water Act], afford redress to citizen plaintiffs who are injured or threatened

with injury as a consequence of ongoing unlawful conduct.").

2. Particularly In Light of Congress's 1983 Amendments, RESPA Does Not Require Proof of Overcharges

As noted above, RESPA gives consumers the right, enforceable in the district courts, to purchase settlement services from title agents and insurers that have not participated in a kickback scheme.

> Consumer protection statutes like RESPA are designed to remedy and prevent harm arising from practices that injure many people but are not, in most instances, sufficiently damaging to outweigh the cost of litigation. Often, these statutes provide for a private right of action and attempt to encourage litigation by allowing for "statutory damages." Statutory damages relieve litigants of the burden of having to prove an exact measure of the pecuniary harm arising from a violation of their rights under the statute. They also provide litigants with a bounty for acting in the public interest. [*Patton*, slip op. at 5.]

Thus, even if Plaintiffs have not alleged direct pecuniary harm flowing from Defendants' violations of § 2607(a), they have standing to pursue their claims in federal court. *See Environmental Defense Center, Inc. v. Environmental Protection Agency*, 344 U.S. 832, 868 (9th Cir. 2003) ("The Supreme Court has also acknowledged that standing may be established by harm resulting indirectly from the challenged acts.") (citing *Warth v. Seldin*, *supra*). Here, Congress has already reasonably found that kickbacks tend to increase the costs of settlement services, whether directly or indirectly. 12 U.S.C. § 2601.

The leading case, which Defendants do not cite, is *Kahrer v. Ameriquest, supra*, which held after a careful analysis of both statutory language and congressional intent that plaintiffs need not prove an overcharge. As the court put it in *Yates v. All American Abstract Co.*, 487 F. Supp. 2d 579, 582 (E.D. Pa. 2007), decided just three months ago, "*Kahrer* . . . looks primarily at the plain language of the statute and its complete legislative history to conclude that a plaintiff who is entitled to damages under Section 8(d)(2) can seek to treble the full amount she paid in settlement services to the defendants." The *Yates* court, after surveying Defendants' authority, called *Kahrer*'s reasoning "cogent," and a number of other courts have agreed. *See, e.g., Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 489 (D. Md. 2006) (finding standing; although plaintiff also alleged overcharges, the alleged § 8(a) violation itself presented the possibility for other harm, "including a lack of impartiality in the referral and a reduction of competition between settlement service providers"); *Benway v. Resource Real Estate Services, LLC*, 239 F.R.D. 419, 425 (D. Md. 2006) ("Section 8(a)'s prohibition against the payment of formal kickbacks or fees for the referral of business . . . does not require establishment of an overcharge to the consumer."); *Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268, 277 (N.D. Ohio 2006) (agreeing that damages for "affiliated business arrangement" claims include all charges paid to the sham ABA, not just the amount of the referral payment, based on the plain language of Section 8 and the legislative history of the 1983 amendment).

Just as instructive, HUD – on whose interpretive regulations Defendants directly rely, Mem. 12-13 –

has interpreted the statute to prohibit all transactions tainted by kickbacks, regardless of whether the consumer directly pays more. 24 C.F.R. § 3500.14(g)(2) (fact that payment of referral fee does not cause increased charge by payor "is irrelevant"). HUD's interpretation of the statute it administers – enforcing the same prohibitions relied on by Plaintiffs, 12 U.S.C. § 2607(a) – is entitled to substantial deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

The contrary cases cited by Defendants are based on inadequate legal reasoning, and in particular fail to consider the effect of substantial 1983 amendments to RESPA which changed the language of the damages provision, 12 U.S.C. § 2607(d)(2). *Contawe v. Crescent Heights of America, Inc.*, 2004 WL 2244538 (E.D. Pa. October 1, 2004), and *Williams v. First American Title Insurance Company*, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005), are both predicated on a decision by a Texas district court in *Moore v. Radian Group*, 233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd without opinion*, 69 Fed. Appx. 659 (5th Cir. 2003).

In *Moore* (the "most-often cited opinion" for Defendants, Mem. 9), the court held that "[t]ying (and trebling) the recoverable damages to that portion of the charge for the settlement service 'involved in the violation' advances the purposes of RESPA while respecting Article III's command that a private plaintiff must suffer an actual injury before invoking the jurisdiction of a United States District Court." 233 F. Supp. 2d at 825. The court justified this position by reference to the 1974 Senate Report (addressing, naturally, the Senate's version of the bill), which limited damages to "three times the amounts of the

proscribed payment, kickback or referral fee." *Id.* at 825-26 (quoting S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6552). The court failed to consider the fact that the statute, as ultimately enacted, did not use the Senate's language, but rather provided in 1974 that:

> [A]ny person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split or percentage.

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-353, § 8(D)(2), 88 Stat. 1724 (1974). The *Moore* court similarly failed to consider the 1983 amendment to § 8, which replaced the language entitling a plaintiff to three times "the thing of value" with an amount equal to three times the amount of "any charge paid for such settlement services." Had the court properly considered these portions of RESPA's legislative history, it would have found it difficult to limit actual injury to "charge inflation."

Moore in turn relied on two flawed decisions, *Durr v. Intercounty Title Company of Illinois*, 14 F.3d 1183 (7th Cir. 1994), and *Morales v. Attorneys' Title Insurance Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997). Those decisions have been extensively criticized by the U.S. District Court for the Western District of Pennsylvania in *Kahrer*, *supra*. Among the *Kahrer* court's critiques, *Durr* analyzed neither RESPA nor

its legislative history, but "merely concluded, without discussion, that the plain meaning of 'three times the amount of any charge paid for such settlement services' means three times the overcharge." *Kahrer*, 418 F. Supp. 2d at 754. The *Kahrer* court further found that *Morales* was flawed for the reasons Plaintiffs have articulated in criticizing *Moore*. *Id.* at 753-54.

In fact, only one case cited by Defendants, *Carter v. Welles-Bowen Realty, Inc.*, 2007 WL 1576020 (N.D. Ohio May 31, 2007), actually addresses the critical effect of the 1983 changes to § 2607(d)(2). There, plaintiffs did not allege they were overcharged for title insurance or settlement services. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and standing, arguing that plaintiffs suffered no injury-in-fact.

The district court observed the split in authority between *Kahrer* and similar holdings, on the one hand, and *Morales* and *Moore*, on the other. The court declined to follow *Kahrer*, based on its conclusion that the 1983 amendment merely "consolidated" the two damages provisions previously found in §§ 2607(a) and (b). 2007 WL 1576020, at *5. Had Congress intended to allow plaintiffs to recover treble the entire amount of settlement charges, it would have used the language it used when drafting the damages provision of § 2608(b). *Id.* Finally, the court noted that the 1983 amendment did not alter RESPA's stated purpose of protecting consumers "from unnecessarily high settlement charges." *Id.*

Unfortunately for Defendants, the *Carter* court's interpretation of the 1983 amendments – as merely "consolidating" the damages provisions of subsections (a) and (b) and eliminating the phrase "thing of value"

without changing the meaning of subsection (d)(2) – is flat wrong.[1] The 1983 amendments worked several significant changes to RESPA. Congress in particular sought to address for the first time the situation of "controlled business arrangements," in which settlement business is referred between affiliated entities without the direct payment of referral fees. *Kahrer*, 418 F. Supp. 2d at 754.

Congress recognized that these arrangements could harm consumers beyond an increase in settlement charges, such as by eliminating the impartiality of the referrer, causing referrals to made for reasons other than the quality of the service, and "effectively reduc[ing] the kind of healthy competition" generated by independent settlement service providers. H.R. Rep. No. 97-532, 97th Cong., 2nd Sess. at p. 52 (1982).

To deal with the situation, Congress in 1983 exempted such controlled business arrangements from RESPA's prohibitions only if specified conditions were met. In addition, Congress eliminated the damages provisions favorable to the settlement services industry, including Defendants, in favor of broad damages "in an amount equal to three times the amount of any charge paid for such settle-

---

[1] Similarly, the fact that Congress did not parrot the language of § 2608(b), "in an amount equal to three times all charges made for such title insurance," does not suggest that it sought to limit damages for violations of § 2607(a) or (b) to the amount of the overcharge, kickback or unlawful split. Had Congress intended to limit damages in this way, it would have maintained, not excised, the language in the 1974 version of the statute. "Moreover, it appears that trebling *any* charge paid for the settlement service is more indicative of an intent to include all charges rather than merely the portion that constitutes the overpayment." *Kahrer*, 418 F. Supp. 2d. at 753.

ment service," regardless of whether the defendants' conduct violates subsection (a) or (b). 12 U.S.C. § 2607(d)(2) (emphasis added). The changes to the damages provision, far from "consolidating" the remedies established by the 1974 version of the Act, reflect the new remedy Congress sought to apply to all situations where illegal kickbacks are used, including (but not limited to) such controlled business arrangements:

> If the persons involved in controlled business arrangements violate the conditions governing such arrangements, they shall be jointly and severally liable to the persons whose settlement service is involved in the amount of three times the amount of the charge paid for the settlement service plus court costs and reasonable attorneys' fees.

H.R. Rep. No. 98-123, 98th Cong., 1st Sess. at p. 77 (1983). As the *Kahrer* court aptly noted, "calculating the penalty based on the entire amount of the settlement service appears to address situations where no direct referral fee has been paid." *Kahrer*, 418 F. Supp. 2d at 755.

The unambiguous language of the new, 1983 § 2607(d)(2) is hardly restrictive. Consumers may recover treble the amount of the fees they paid for settlement services from a person who violates the provisions of subsections (a) or (b). *Kahrer*, 418 F. Supp. 2d at 753 ("[A]s the *Morales* court appears to have acknowledged, the literal language of § 2607(d)(2) provides for three times the amount of *any charge* paid for the settlement services which would appear to encompass all of the charges associated with the services provided rather than only

treble the amount of any overpayment.") (emphasis in original).[2]

3. The Filed Rate Doctrine Does Not Prevent Standing

Defendants rely heavily on the "filed rate doctrine," which addresses suits for damages arising from transactions in a regulated industry where the filed rate is the only legal rate and controls the relationship between the parties. *Keogh v. Chicago & NW Ry. Co.*, 260 U.S. 156 (1922). Some courts have treated the filed rate doctrine as a matter of constitutional standing. *See Morales v. Attorney's Title Insurance Fund, Inc., supra.* "The Supreme Court has made it clear, however, that the filed rate doctrine is not a constitutional standing doctrine, but rather is a prudential presumption that Congress did not intend to create remedies that would undermine a rate-making scheme." *Patton*, slip op. at 4. Here, Named Plaintiff Edwards has not asserted any right to pay a rate other than the filed rate for title insurance premiums. An award of statutory damages under RESPA would not require this Court to second-guess the Ohio Title Insurance Rating Bureau or any other state's comparable regulatory authority.

---

[2] Language limiting damages to the overcharge does not appear in § 2607(d)(2) or 2608(b), or in any earlier version of either statute. In fact, the prior version of § 2607(d)(2) limited damages to three times the "portion, split or percentage" of the kickback – not the overcharge. Moreover, "[n]othing in § 2601 indicates that RESPA § 8 was intended to eliminate all settlement services overcharges." *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 260, 268 (4th Cir. 2002). "Instead, its purpose was 'to prohibit all kickback and referral fee arrangements whereby any payment is made or thing of value furnished for the referral of real estate settlement business.'" *Id.* (citation omitted).

Nor would it invite the Court to speculate as to whether compliance with the anti-kickback provisions of RESPA would have resulted in a different rate for title insurance premiums. *Id.* at 8.

In any event, Defendants' argument that Named Plaintiff Edwards did not pay more for title insurance because of Defendants' involvement in Tower City is flawed for three reasons. First, as the rate manual makes clear, it is only the premium for title insurance that is uniform among competing underwriters. *See* Schedule of Rates for Title Insurance in the State of Ohio (Mem. Exh. A) at p. 2.1, GP-4. Thus, the fact that one slice of the cost of the title process – the cost of the premium – is fixed, says nothing about whether other services, and the overall cost of the settlement process, have not increased. As a matter of common sense, the payor of a kickback does it for economic gain, whether direct or indirect.

Second, the uniform rates themselves may be the product of collusion or anticompetitive conduct. According to an April 2007 U.S. Government Accountability Office report, regulators in both California and Texas (Texas, for one, sets insurance rates statewide) have found that regulated rates are the result of lack of competition and "a market structure in which consumers pay for title insurance but others generally choose the title agent and insurer." GAO, "Title Insurance – Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers," April 2007, at 40, Exh. B.

Third, Defendants' argument proves far too much. In effect, it could exempt all kickbacks and referral fees paid in filed-rate jurisdictions (and there are

many)[3] from RESPA. But Congress and its designated agent, HUD, have never chosen to exempt referrals to title insurance underwriters in filed-rate states from §§ 2607(a) and (b), even while creating a myriad of exceptions and safe harbors to those prohibitions. *See, e.g.*, §§ 2607(c)(1), (c)(2), (c)(3), (c)(4), and (d)(3) (exceptions for payments in exchange for services rendered, bona fide salary, real estate agent-broker arrangements, affiliated business arrangements, and violations of ABA rules resulting from genuinely unintentional error). And Congress has delegated authority to HUD to create still further exceptions. *See* § 2607(c)(5). None of these exemptions cover filed-rate transactions.

For this Court to conclude that Plaintiffs lack standing on the basis of the filed-rate doctrine would mean that a plaintiff purchasing settlement services in a filed-rate state could never assert a RESPA claim related to those services. Such a result would not only be unfair, but also an impermissible expansion of the statute.

* * * * *

DATED: August 21, 2007

---

[3] Title insurers are subject to rate filing statutes and regulations in all but seven states and the District of Columbia. A.M. Best Company, Inc., Special Report, "Strong Housing Market Drives Title Insurance Growth in 2005, but Possible Slowdown Ahead," November 27, 2006, at 17, *available at* http://www.alta.org/images/PDF/06ambest_report.pdf. California is a filed rate state. *See* Cal. Ins. Code § 12401-12401.10; 12414.27 (West 2005).

LAW OFFICES OF JAMES W.
SPERTUS

By: /s/ JAMES W. SPERTUS
James W. Spertus
Leah C. Gershon
LAW OFFICES OF
JAMES W. SPERTUS
12100 Wilshire Blvd, Suite 620
Los Angeles, California 90025
Telephone: (310) 826-4700
Facsimile: (310) 826-4711

Cyril V. Smith
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
Telephone: (410) 949-1145
Facsimile: (410) 659-0436

Richard S. Gordon
Martin E. Wolf
QUINN, GORDON & WOLF, CHTD.
102 West Pennsylvania Avenue,
Suite 402
Baltimore, Maryland 21294
Telephone: (410) 824-2300
Facsimile: (410) 825-0066

Edward G. Kramer
David Oakley
THE FAIR HOUSING LAW CLINIC
3214 Prospect Avenue, East
Cleveland, Ohio 44115
Telephone: (216) 431-5300
Facsimile: (216) 431-6149

Attorneys for Plaintiffs

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

[filed Aug. 28, 2007]

Many points could be made in response to Plaintiff's opposition brief, but the most important is this: Plaintiff has admitted that she was not injured by any Defendant, and dismissal is, therefore, required by Article III of the Constitution.

1. **Denise Edwards Must Show She Was Injured.**

* * * * *

Plaintiff's only claimed injury is a violation of an alleged right to a transaction "that was not the result of an illegal kickback." As the Supreme Court has recognized, some statutes create enforceable legal rights, the invasion of which, alone, creates standing.

The Fair Housing Act is a good example, conferring on all persons a right to truthful information about available housing. See Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982). * * *

* * * * *

Dated: August 28, 2007

BRYAN CAVE LLP
Charles A. Newman
Douglas W. King
Darci F. Madden
Joel D. Siegel

By: /s/ JOEL D. SIEGEL / GT
Joel D. Siegel

STEVENS AND O'CONNELL LLP
Charles J. Stevens
400 Capitol Mall, Suite 1400
Sacramento, California
95814-4498
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

Attorneys for Defendants
THE FIRST AMERICAN CORPORATION; and
FIRST AMERICAN TITLE INSURANCE COMPANY

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF RICHARD S. GORDON RE: EXHIBITS TO MOTION FOR CLASS CERTIFICATION

[filed Sept. 25, 2007]

I, Richard S. Gordon, submit this sworn declaration under penalty pursuant to 28 U.S.C. § 1746:

1. In conjunction with Plaintiffs' Motion for Class Certification filed today in the above-caption matter, I have submitted the following exhibits to this Court: a letter agreement, dated October 23, 1998 between representatives of Defendants and representatives of Tower City Title Agency, Inc. named in this litigation; an exhibit to the Letter Agreement, an Agency Agreement dated November 1, 1998, between repre-

sentatives of those same parties; a transcript of the deposition of Marilyn Mannarino, taken on May 30, 2006; and a list of title insurance transactions entered into by Tower City Title Agency LLC between August 12, 2003 and October 12, 2006 (in excess of 1,000 per year), virtually all of which were underwritten by First American Title.

2. I hereby attest and affirm that the preceding named exhibits are true and accurate copies of documents acquired by me in the course of my representation of the plaintiff class in *Shahan v. Tower City Title Agency, Inc.*, Civil Action No. 1:05-cv-01983-DAP (U.S.Dist.Ct.N.D.Ohio), a consumer class action against a title company certified and settled on April 26, 2007.

3. Additionally, in conjunction with the Plaintiffs' Motion for Class Certification filed today in the above-captioned matter, filed as an exhibit is a copy of a draft Joint Stipulation of Counsel provided to me by opposing counsel in the matter. I hereby attest and affirm that this exhibit is a true and accurate copy of the document provided to me by opposing counsel.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of September, 2007 at Baltimore, Maryland.

/s/ RICHARD S. GORDON
Richard S. Gordon

EXHIBIT 1

The First American Financial Corporation
FIRST AMERICAN SQUARE · 114 EAST FIFTH STREET
SANTA ANA, CALIFORNIA 92701 – (714) 558-3211

PARKER S. KENNEDY
President

October 23, 1998

Ms. Marilyn Mannarino
President
Tower City Title Agency, Inc.
6151 Wilson Mills Road
Highland Heights, Ohio 44143

Dear Marilyn:

I am pleased we have come to terms regarding the purchase of an interest in your fine company. Accor ingly, the following teams and conditions constitute an agrement for the purchase and sale by First American Title Insurance Company ("First American") of a 17.5% interest in Tower City Title Agency LLC, an Ohio limited liability company (the "Company"), from the members of the Company and in the percentages described in the attached Schedule 1. Immediately following the closing, the Company will be owned 17.5% by First American and 82.5% by Tower City Title Agency, Inc. ("Tower City").

The total purchase price for First American's interest in the Company shall be $2,000,000.00 payable at the time of closing in cash and registered Common shares of The First American Financial Corporation (the "Financial Corporation"), allocated as described

in the attached Schedule 1. The number of shares to be transferred will be determined as of the third business day preceding the closing date of this transaction and will be based on the average closing price of the Financial Corporation shares on the New York Stock Exchange ("NYSE") for the five business days preceding such third business date, such that the aggregate value of shares transferred will equal $1,500,000 (the "Acquired Shares").

You acknowledge and agree that the Acquired Shares are being issued pursuant to a registration statement (the "Shelf Registration Statement"), which Shelf Registration Statement provides that you may resell the Acquired Shares pursuant to the Shelf Registration Statement for the one year period following the closing (the "Resale Period"). You further acknowledge and agree that the Financial Corporation is required to maintain the accuracy of the information included in the prospectus that is contained in the Shelf Registration Statement. In this regard, you agree to provide written notice to the Financial Corporation, 114 East Fifth Street, Santa Ana, California 92701, Attention: Secretary, within five business days following each sale or other disposition by you of any First American Common shares owned by you (including the Acquired Shares) during the Resale Period.

The Financial Corporation shares are publicly traded on the NYSE. The Financial Corporation will apply to list the Acquired Shares on the NYSE as soon as possible following the execution and delivery of this agreement. The Acquired Shares will be issued as soon as practicable, upon the date of receipt of the NYSE authorization to list the Acquired Shares on the NYSE (the "Authorization"). All costs associated

with the NYSE listing application shall be borne by the Financial Corporation.

First American hereby acknowledges, and you hereby represent and warrant, that the Company was formed on September 23, 1998 and that the assets of the Company are substantially the assets of Tower City, which Tower City contributed in exchange for its membership interest in the Company.

Subject to the satisfaction of the terms, conditions, and contingencies herein, the closing date for this transaction will be November 1, 1998, provided the Authorization has occurred; otherwise, the closing date shall be a date mutually agreeable to the parties on or within 15 days after the date the Authorization has been received by the Financial Corporation.

1. At the time of closing, the assets and liabilities of the Company must be materially the same as that shown on the balance sheet of Tower City, dated June 30, 1998, attached hereto as Exhibit A, except that the assets of the Company at the time of closing will not include the Florida condominium retained by Tower City. It is, of course, understood that there will be minor changes to the balance sheets due to normal operations of the business.

2. You, Regina Zeller, and Tower City shall have executed and delivered to First American an Agreement Not to Compete with the Company in the form attached hereto as Exhibit B.

3. The Operating Agreement of the Company shall be amended and restated to read in the form attached hereto as Exhibit C. At the time of its purchase of an interest in the Company, a duly authorized officer of First American shall execute such Operating Agreement.

4. First American shall be satisfied that, as of the closing date, First American and Tower City shall be the only members of the Company.

5. First American shall be satisfied that the representations and warranties of the Company, Tower City, and each shareholder of Tower City set forth below are true and correct in all material respects on and as of the date of closing.

6. The Company shall have executed and delivered to First American an Agency Agreement with First American in the form attached hereto as Exhibit D.

7. The Company and its members shall have caused the Company to make an Internal Revenue Code Section 754 election, which election shall be timely filed with federal and/or state taxing authorities.

8. Tower City shall have executed the Questionnaire in the form attached as Exhibit E.

By signing and returning the enclosed copy of this letter agreement, the Company, Tower City, and each shareholder of Tower City represents and warrants that:

1. As of the closing date, First American will hold a 17.5% interest as a member of the Company. The persons listed on the attached Schedule 1 have full right and power, without restriction, to sell to First American their respective interests in the Company; and, further that First American shall own such interests free and clear of all trusts, liens, encumbrances, claims, equities, charges and liabilities of any nature whatsoever, including without limitation any rights or claims any members may have had

under any prior operating agreement of the Company: and First American shall obtain title thereto free of adverse claims except as restricted by the Operating Agreement, and shall not be further obligated to extend additional capital or be liable for the debts, liabilities or obligations of the Company except as provided in the Operating Agreement of such entity or as may be imposed by operation of law.

2. The Company has only one class, group or series of members and the membership interests to be acquired by First American are of the same class, group or series as the interests of the other members of the Company; all members of the Company are parties to this agreement; each member consents to First American acquiring a membership interest in the Company; and no other consents are required to effectuate the terms of this agreement, including without limitation the issuance of a membership interest in the Company to First American.

3. All year end and interim financial statements, previously or subsequently submitted and reviewed by First American, fairly reflect the financial condition of the Tower City or the Company, as the case may be; all books of account and records of Tower City and the Company have been maintained on a cash basis and accurately reflect all items of income and expense of Tower City and the Company appropriate under such accounting method (including the balance sheets attached hereto as Exhibit A); the Company has title to the assets set forth on said books of account, free and clear of liens and encumbrances; and, that, between the date of execution hereof and closing, the Company's business will be conducted in the ordinary course.

4. Except as set forth on Schedule 4 attached hereto and incorporated herein by reference, there exists no inquiry, investigation, claim, arbitration hearing, or lawsuit, pending or threatened, involving any matter to which the Company is or may be a party.

5. The execution of this agreement and the sale that is the subject hereof do not violate any contract, mortgage, indenture, agreement, or understanding of any kind or character nor do they violate any Articles of Organization, Regulations, operating agreement, or other covenant, accord, trust or indenture.

6. The Company and its operations are in material compliance with, and are not in material violation of, any applicable federal, state or local statutes, laws or regulations,

7. The Company is organized under the Limited Liability Act of the State of Ohio and is taxable as a partnership under the United States Internal Revenue Code. The Company and Tower City have timely filed all required federal, state, and local tax returns and are not delinquent in the payment of any such taxes. Neither You nor Tower City is aware of any pending or threatened assessment with respect to any tax or levy. All information concerning taxes available to you or Tower City is reflected in the data either (1) submitted to First American or (ii) available to First American during its due diligence period. Estimated accrued taxes have been computed accurately based on current available information and are reflected in the data either (1) submitted to First American or (ii) available to First American during its due diligence period.

8. All information regarding the Company provided or to be provided to First American is complete and accurate in all material respects and does not fail to state a fact material in light of the circumstances in which such information is provided, unless otherwise specifically qualified in writing at the time such information is provided.

9. Tower City is a corporation not formed for the specific purpose of acquiring the Acquired Shares, with total assets in excess of $5,000,000.00.

10. No person is or will be entitled to any brokers' or finders' fee or any other commission or similar fee, directly or indirectly, in connection with the transactions contemplated by this agreement, as a result of any action taken by you, the Company, or Tower City.

All representations and warranties made herein shall survive closing. You, Tower City and each of its shareholders hereby agree to indemnify, defend, and hold harmless The First American Financial Corporation, First American and each of their respective employees, officers, directors, shareholders and affiliates from any claims or liabilities arising from the breach of such representations and warranties or your failure to perform your obligations under this letter agreement.

This agreement is made subject to our due diligence and audit of the books and records of the Company. Prior to the closing, you and Tower City will cause the Company to make available the Company's and Tower City's books and records to First American in order for First American to complete a financial audit and due diligence examination of the Company's business and organizational structure. In the

event First American's due diligence examination reveals a material discrepancy, or a material omission is discovered, from anything represented or delivered to First American, First American may declare this letter agreement to be null and void and, thereafter, no party shall have any duty to any other party hereunder.

While this letter agreement is somewhat informal, our signatures below indicate our mutual agreement to the terms herein. In the unlikely event that any dispute resulting in litigation arises under this agreement or the operation of the businesses the subject hereof, the prevailing party may recover attorney's fees from the other.

If this letter agreement and the enclosed Agreement Not To Compete, Operating Agreement, and Underwriting Agreement properly outline the terms and conditions which we have discussed, please sign both sets of these documents in the provided spaces and return one set of documents to me for our records. To expedite this process, this agreement may be signed in two or more counterparts and by the different parties to this agreement in separate counterparts, with the same effect as if all parties had signed the same document.

Thank you very much for your courtesy and cooperation. We have enjoyed working with you over the years, and we all look forward to continuing to work with you and the fine people at Tower City Title.

Very truly yours,

/s/ PARKER S. KENNEDY

Parker S. Kennedy
President

Agreed and accepted:

/s/ MARILYN A. MANNARINO Date: 11/2/98
Marilyn A. Mannarino

/s/ MARILYN A. MANNARINO Date: 11/2/98
Marilyn A. Mannarino, in her capacity as Trustee under the Trust Agreement dated March 9, 1995

/s/ REGINA A. ZALLER Date: 11/2/98
Regina A. Zaller, in her capacity as T.O.D. to the then acting Trustee under the Regina A. Zaller Declaration of Trust date June 10, 1993, as modified

/s/ ANITA M. ZALLER Date: 11/2/98
Anita M. Zaller

/s/ ANNA G. CAMPANELLA POA Date: 11/2/98
Anna G. Campanella by Patricia Marino her attorney in fact

/s/ MARIE D. MCCLINTOCK Date: 11/2/98
Marie D. McClintock

TOWER CITY TITLE AGENCY LLC

/s/ MARILYN A. MANNARINO, PRES. Date: 11/2/98
Marilyn A. Mannarino, President

TOWER CITY TITLE AGENCY, INC.

/s/ MARILYN A. MANNARINO, PRES. Date: 11/2/98
Marilyn A. Mannarino, President

Schedule 1

TOWER CITY TITLE AGENCY LLC ASSIGNEES

Name	% Interest to be Assigned	Allocable Portion
1. Tower City Title Agency, Inc.	16.5	$ 1,886,000 (cash and all stock)
2. Marilyn Mannarino	1.0	114,000 (all cash)
TOTALS:	17.5%	$ 2,000,000

AGENCY AGREEMENT

This Agreement, by and among MIDLAND TITLE SECURITY, INC., an Ohio corporation, whose address is 1360 East 9th Street, IMG Center, Cleveland, Ohio 44114 ("Midland"), and Tower City Title Agency, L.L.C. and Marilyn Mannarino, whose address is 6151 Wilson Mills Road, Highland Heights, Ohio 44123 (each an "Agent"), agree as follows:

1. **Appointment.** Midland, as general agent of and for First American Title Insurance Company of California ("First American"), in the exercise of its authority to appoint agents on behalf of First American with respect to the transaction of the business of title insurance in the state of Ohio, hereby appoints Agent an agent of Midland and/or First American for the transaction of Midland's title insurance business which Agent agrees to promote and perform exclusively for Midland and/or First American in all counties in Ohio. Notwithstanding such exclusivity and as an exception therefrom, Agent shall be permitted to: (i) enter into an agency agreement with Stewart Title Insurance Co., which is substantially identical with the agreement currently with Tower City Title Agency, Inc., so long as Agent does not write policies aggregating premium remittances to Stewart Title which are significantly more than the minimum premium remittances Stewart Title currently requires of its agents to maintain its agency contracts and, (ii) enter into agency agreements with certain other underwriters when a particular customer (or customers) require the use of only that certain other underwriter (or underwriters) as a condition to doing business with such customer (or customers) and First American would not be acceptable to such customer (or customers), provided that the foregoing shall be strictly construed and intended to permit the use of

another underwriter only when the alternative would be a direct loss of business to Agent. The "business of title insurance", as used herein, means rendering any or all of the following services to any legal person in consideration of the payment of a fee:

A. Receiving and processing applications for title commitments, title guarantees, judicial reports, guaranteed certificates of title, title insurance policies, endorsements, or other forms of title evidence approved by First American (the "Approved Title Evidences");

B. Examining the chain of title to real estate in connection with the issuance of the Approved Title Evidences; and

C. Issuing the Approved Title Evidences in accordance with the terms and provisions of this Agency Agreement.

2. **Authority.** Agent may sign, countersign, and issue commitments, title guaranties and insurance policies, endorsements and other forms of title evidence authorized by Midland and/or First American (herein sometimes referred to as "title evidence" or "premium-bearing forms"), on real estate located in the county or counties referred to above, and in such other counties as may be designated by Midland and/or First American.

3. **Agent's Obligations.** Agent shall:

A. Take all reasonable steps to solicit title insurance business and to promote the use of title insurance in the area in which Agent does business.

B. Receive and process applications for title insurance in accordance with the usual and customary practices and procedures of responsible title insurance agencies in the conduct of their business in a prudent, safe, sound, and ethical manner in accor-

dance with recognized title underwriting principles and the rules, regulations and instructions of Midland and/or First American. The determination of the insurability of any title, subject to the provisions of Seetion 5, shall be based upon one or more of the following:

(1) A search by Agent of all relevant public records.

(2) An examination of the abstract of title prepared and certified by Agent or by another recognized abstractor whose work is accepted by prudent local title examiners and whose work shows all relevant public records.

(3) An examination of Agent's indices and records supplemented to the extent necessary by an abstract or search of the relevant public records.

(4) Title reports or opinions, on forms furnished or approved by Midland and/or First American, by examiners approvcd by Midland and/or First American.

C. Preserve in its possession all supporting documents on which the determination of insurability is made, including, but not limited to, affidavits, lien waivers, searches, and work sheets; and provide Midland and/or First American with access to said documents at any reasonable time or times.

D. Assume full responsibility for the collection of all premiums due in accordance with the rates established in Paragaph 7 of this Agreement for properties located in the state of Ohio and pay to Midland and/or First American the share of such premium due Midland and/or First American on or before the 15th day of the month succeeding that in which the premium-bearing form was issued. Each payment to Midland and/or First American shall be accompanied

by a copy of each premium-bearing form issued during the period covered by the remittance.

E. Keep a policy register in a form approved by Midland and/or First American in which the Agent shall enter a record of and show the disposition of all policies, endorsements and other contracts under which Midland and/or First American assumes liability for the condition of title. The Agent shall be liable in damages for any loss resulting to Midland and/or First American by reason of the loss or wrongful use of any premium-bearing forms.

F. Keep safely and segregated in a bank account all monies that may be entrusted to Agent in the course of Agent's operations hereunder, and keep safely any property so entrusted to Agent. Any funds or property deposited with Agent as security for the disposition of or affirmative insurance with respect to a matter that would be included in Schedule "B" of the policy, shall be transferred to Midland and/or First American on or before the 10th day or the month succeeding that in which it was received, together with a copy of the agreement or other documentation pursuant to which the funds or property were received, and such funds or property are to be retained by and under the control of Midland and/or First American in the same manner as similar funds or property held by Midland and/or First American pending disposition pursuant to the agreement under which it was received.

G. Make available at all reasonable times for examination and audit by Midland and/or First American all accounts, books, ledgers, searches, abstracts and other records of Agent relating to the title insurance business carried on by Agent for Midland and/or First American.

H. Agent agrees it will maintain all of its accounts and financial transactions in accordance with procedures acceptable by state law, and generally accepted accounting procedures.

I. Agent agrees it will timely provide a balance sheet and profit and loss statement annually prepared by a certified public accountant but in no event any later than 90 days after the close of the calendar year or fiscal year, as applicable.

J. Agent shall carry at its own expense title insurance agent's errors and omissions liability insurance in a principal sum not less than $250,000.00 issued by a company or companies acceptable to Midland and/or First American and furnish Midland and/or First American with current premium receipts. Agent shall be liable to pay all amounts, including attorney fees, up to and including the first Twenty-Five Hundred Dollars ($2,500.00) of each loss arising on any one title evidence or premium-bearing form issued by Agent, provided any loss is attributed as a direct result of the negligence or misconduct of the agent or its employees or independent contractors. Liability of Agent for such sum or sums as it may become liable to pay hereunder shall not end upon the termination of this Agreement but shall continue for as long as any title evidence or premium-bearing form issued by Agent remains in force.

4. **No Agency For Escrow or Closing.** It is understood and agreed that Agent is not an agent of Midland and/or First American for the transaction of escrow or closing business and Midland and/or First American expressly deny liability for Agent's conduct of such business. Agent recognizes, however, that claims for liability resulting from Agent's conduct of such business might nevertheless be asserted against Midland and/or First American and, in an effort to

minimize such risk, Agent agrees to adhere to its conduct of any such business to Midland's instructions for the operation of the Midland branch offices engaged in such escrow or closing functions. Agent agrees to keep safely and segregated in separate bank accounts all monies entrusted to it in the course of its escrow or closing business and to make available at all reasonable times for examination and audit by Midland and/or First American all accounts, books, ledgers, files and other records of Agent relating to its escrow or closing business.

Although any escrow business conducted by Agent is not within the scope of this Agreement, Midland and/or First American may from time to time, as an accommodation to Agent in the promotion of Agent's title insurance agency business, issue a "closing protection letter" to a prospective insured or other party to a real estate transaction being processed by Agent, the effect of which is to bind Midland and/or First American to indemnify the addressee thereof against certain losses resulting from Agent's errors, omissions or misconduct in acting as escrow agent for the parties to the transaction, all in accordance with the terms and conditions stated in such letter. In the event Midland and/or First American makes payment of a claim arising out of the conduct of Agent's escrow business (whether or not based on such letter of indemnity) either as a result of entry of judgment against Midland and/or First American or as a result of compromise and settlement, Agent shall promptly reimburse Midland for the full amount of Midland's and/or First American's expenditures, including attorney fees and costs of litigation or settlement negotiations.

Agent agrees that at any reasonable time or times during the terms of this Agreement, it will permit

examination by Midland and/or First American of all accounts, books, ledgers, tax returns and other financial and business records relating to the title insurance business conducted by Agent for Midland and/or First American. The parties hereto agree that the manner of operation of any escrow business by Agent is a legitimate concern of Midland and/or First American because of issuance by Midland and/or First American of "closing protection letters" and because of quality of such services performed by Agent bears on the Agent's continuing ability to generate title insurance business on behalf of Midland and/or First American. Agent, therefore, agrees that although the Agent's escrow business is outside the scope of the agency relationship created by this Agreement, Midland and/or First American shall be permitted at any reasonable time or times to examine all financial and business records relating to any escrow business conducted by Agent.

5. **Prohibitions.** Agent shall not, without written approval of Midland and/or First American:

A. Incur debts in the name of Midland and/or First American; admit, deny or adjust any claim for loss; or accept service of process on behalf of Midland and/or First American.

B. Commit Midland and/or First American to: (1) a risk in excess of $1,000,000.00; (2) a risk involving a title where Agent has knowledge that a dispute exists among lawyers; (3) a risk where Agent has knowledge of risks, adverse claims or questions of title known in the community; (4) any extraordinary risk as set forth in Midland and/or First American's rules, instructions or manuals. All such titles, together with the supporting abstracts, certificates of title, chain of title (if no abstract is furnished) searches, and a state-

ment of the special question involved, if any, shall be submitted to Midland and/or First American for consideration before Agent incurs any liability on behalf or Midland and/or First American.

C. Commit Midland and/or First American to any interpretation of the printed terms of any document.

D. Accept or agree to accept any holdbacks, hold harmless agreements or indemnity agreements, whether secured or unsecured, as a basis for affirmatively insuring over, or omitting from a policy, any title risk or exception.

E. Alter forms furnished by Midland and/or First American.

F. Accept an application for title insurance, for an amount less than the approximate value of the premises involved in the case of an owner's policy, or for less than the amount of the indebtedness in the case of a lender's policy, or otherwise vary from the applicable rates established by Midland and/or First American from time to time,

G. Accept service of legal process on behalf of Midland and/or First American, unless required by state law, in which event Agent shall immediately forward to Midland and/or First American all documents served.

H. Request Midland and/or First American to issue its title policy or other indicia of title insurance provided for herein knowing it, Agent, at that time is in default or otherwise negligent in the performance of any of its obligations and agreements contained herein.

6. **Midland's and/or First American's Obligations.** Midland and/or First American shall:

A. Furnish the Agent with all commitments, policies, endorsements and other contracts under which First American assumes liability for the condition of title.

B. Determine all questions of risk submitted by the Agent.

C. Provide for reinsurance when necessary.

D. Appoint Agent in writing as a validating officer to countersign the forms issued to Agent.

7. **Compensation and Remittance.** Agent agrees to be responsible for the collection of all premiums for Title evidence issued by Agent in accordance with the then effective schedule of rates as filed with the Ohio Department of Insurance by First American and shall retain eighty-five percent (85%) as its commission on all premiums written. The balance of said premiums shall be remitted to Midland and/or First American no later than the 15th of the month following the month in which such premiums are written. All remittances not received by Midland and/or First American within sixty (60) days from the date on which such remittances are due shall automatically accrue interest at a rate equal to two percent (2%) per annum above the Prime Rate of National City Bank, Cleveland, Ohio, in effect from time-to-time, until paid. Agent shall forward to Midland and/or First American with each monthly report and remittance a copy of each form of Title Evidence referred to therein. Midland and/or First American retains the right to revise the remittance date and/or schedule rates, whereupon the remittance schedule shall be altered accordingly; provided, however, that no increase in rates shall apply to applications for title insurance or other contracts pending in Agent's office at the effective date of such revision nor shall

any revision alter Agent's right to compensation already earned.

If the current annual tax, gross premium tax or State Income Tax rate, as applicable, shall be increased, or should a tax or assessment in addition, substitution or in lieu thereof be imposed on Midland and/or First American, either by constitutional amendment, legislative act or otherwise and should said tax or assessment be higher than the tax as presently paid by Midland and/or First American, the Agent and Midland and/or First American shall, in good faith, renegotiate the percentage of gross premiums paid to First American hereunder.

In the event that the parties cannot, after good faith negotiations, come to any agreement, then Midland and/or First American shall have the option to terminate this Agreement by giving 60 days written notice to Agent in accordance with paragraph 11(A)(2) following.

8. **Reinsurance and Coinsurance: Extra Hazardous Risks.** Midland and/or First American shall have sole discretion as to whether any particular risk shall be reinsured or coinsured by another title insurance company. If any risk is reinsured or coinsured, Agent's compensation shall be computed on the basis of the net amount remaining after taking into account the cost of such reinsurance or coinsurance year Agent will not be entitled to any portion of any premium paid for reinsurance or coinsurance, or any additional premium charged by Midland and/or First American for insuring an extra hazardous risk.

9. **Indemnity.** Agent agrees to indemnify Midland and/or First American for all loss, cost or damage which Midland and/or First American may sustain or become liable for on account of:

A. Willful failure of Agent to comply with the terms of this agreement or with the rules, regulations or instructions given to Agent by Midland and/or First American.

B. Grossly negligent errors or omissions in Agent's abstracting or examining of title.

C. Intentional omissions from commitments and/or policies of any printed part of the policy or commitment in reference to encumbrances.

D. Errors or omissions which are disclosed by the application, the approved examiner's report or which were known to Agent and not disclosed to the insured prior to closing and not shown on the policy.

E. Any negligence on the part of the agent with respect to escrows or closings or any activity on the part of the agent in violation of the first paragraph of section 4 of this agreement.

F. Any obligation of Agent with respect to the provisions of Section 3J of this Agreement.

G. Defalcation, fraud or dishonesty on the part of Agent or any employee, officer, agent or director of Agent.

10. Claims. If a claim is asserted to Agent, or if Agent is aware of any facts or circumstances which might result in a claim against Midland and/or First American, Agent shall immediately notify Midland and/or First American according to current reporting procedures then in effect and, if required, shall submit a written report, and shall lend all reasonable assistance without charge to Midland and/or First American in investigating or contesting any claim; provided, however, Agent shall not be required to retain counsel or pay attorney's fees in connection with such claim, except as to claims for which Agent

is liable under the provisions of Paragraph 9 hereof, and those sums for which Agent is liable under the provisions of paragraph 3(J) hereof.

Midland and/or First American shall proceed with such investigation, negotiation and litigation of any claim of loss as Midland and/or First American shall deem appropriate and shall employ counsel of its choice to render such services as Midland and/or First American shall deem desirable. Midland and/or First American shall keep Agent as fully informed as shall be practicable concerning progress made toward final settlement. Midland and/or First American shall have a sole right to effect a settlement of any claim of loss.

11. Termination

A. This Agreement shall be terminated by any of the following:

(1) Mutual agreement by the parties to terminate.

(2) Written notice of cancellation to take effect 60 days after delivery by either Midland and/or First American or Agent to the other provided that so long as either Midland or First American has an interest in Tower City Title Agency, L.L.C., this section 11.A(2) shall not be applicable.

(3) Immediate termination upon the occurrence of any material breach by either Midland and/or First American or Agent of any of their obligations or undertakings to each other and fails to cure such material breach within forty-five (45) days of receipt of written notice to the defaulting party from the non-defaulting party. Material breach on the part of Agent includes, without limitation: (i) claims or losses, paid or

reserved, which exceed fifty percent (50%) of the Agent's remitted premiums during any six (6) month period, and (ii) any material deviation from the rules promulgated by Midland and/or First American and furnished to Agent, or entering into an agency, subagency or similar agreement with another title insurance company or underwriter without prior written consent of Midland and/or First American, other than is permitted under Section 1 of this Agreement.

(4) The filing of a petition in bankruptcy by or against either party hereto or the appointment of a receiver for the property of either party where such appointment is based, in whole or in part, on the allegation of insolvency.

(5) Fraud, cancellation of license or permit to do business, or the instigation of legal proceedings by local, State or Federal authorities, which proceedings, if successful, would lead to cancellation of permit or license to do business, provided, however, that probable cause must exist that any such proceedings will be successful.

(6) Agent becomes more than thirty (30) days delinquent mailing to Midland and/or First American the monthly report and remittance called for by Paragraph 7 precedi

B. In the event of a shortage of entrusted to Agent by Midland and/or Fir erican or others, Midland and/or First Ameri ay cancel and terminate this Agreement immdiately upon written notice to the agent, notwithstanding any provisions contained herein to the contrary, and further, Midland and/or First American may declare immediately due any debts or accounts owed by Agent to Midland and/or First American, and Midland and/or First American shall have a

lien on all property of the Agent as security for the repayment to Midland and/or First American of any such debts or accounts and any losses or claims Midland and/or First American may be subjected to by reason of the Agent's inability or refusal to account for funds entrusted to Agent; and on demand by Midland and/or First American, Agent shall forthwith make good the shortage.

C. On termination of this Agreement it shall be the duty of Agent to furnish to Midland and/or First American at once a complete accounting of all unpaid premiums and promptly to return to Midland and/or First American all files relating to premium-bearing forms issued or about to be issued by Agent on behalf of Midland and/or First American, and all unused form, blanks and supplies furnished by Midland and/or First American to Agent. No termination shall affect Agent's right to compensation on applications received by him prior to the termination.

D. The respective obligations of the parties relating to liability for losses and defending, appearing in, and paying the costs of litigation shall survive any termination of this Agreement, and in the event of any litigation which might result in the assertion of any claim of loss under any policy issued hereunder, or in the event that Midland and/or First American is informed of any circumstances which might result in a claim of loss under any such policy, Midland and/or First American shall have the right to make an examination of the pertinent books, records and papers of the Agent as it may deem advisable or necessary, whether or not this Agreement has been otherwise terminated, and Agent agrees that the books, records and papers will be kept intact.

[Section 12 struck out by hand in original document]

13. **Assignment.** This Agreement may be assigned by Midland and/or First American to any successor of Midland and/or First American, but shall not be assigned by Agent without Midland's and/or First American's prior written consent. Any assignment by Agent without having obtained Midland's and/or First American's prior written consent is void.

14. **Independent Contractor.** Except for purposes of issuing and delivering title evidence, subject to and in accordance with the terms and provisions of this Agreement, Agent is an independent contractor, and shall be in full and complete control of the operation of his title office, including full control of all personnel.

15. **Notices.** Any notice or other communication hereunder shall be in writing and shall be deemed to be delivered on manual delivery thereof, or upon deposit in the United States mails by Certified Mail, addressed to a party at the address hereinabove set forth, or at such other address as a party shall furnish to the other by notice hereunder.

16. Agent understands and agrees not to solicit customers of Midland and/or First American by representing or implying to such customers that they will receive the same service and underwriting from Agent as if they were dealing directly with Midland and/or First American. Midland and/or First American shall give to Agent the same underwriting considerations however as it would give to its own customers in its direct operations. Agent further agrees, in an effort to avoid confusion in the market, not to represent itself as an agent of Midland or a part of the Midland and/or First American organization, but

will instead hold itself out as an agent of First American Title Insurance Company.

Midland and/or First American agrees not to use to its competitive advantage knowledge of Agent's customers obtained by or submitted by Agent in requests for underwriting approval on particular transactions.

17. This Agreement may be executed in counterparts, each of which shall be deemed an original. Paragraph headings are included for convenience only and are not part of this Agreement.

IN WITNESS WHEREOF, this Agreement is executed as of the 1st day of November 1998.

MIDLAND TITLE SECURITY, INC.
FIRST AMERICAN TITLE INSURANCE CO.
("Midland")

By: /s/ JAMES STIPANOVICH
James Stipanovich, President
CEO and Regional Vice President

TOWER CITY TITLE AGENCY, L.L.C.
("Agent")

By: /s/ MARILYN MANNARINO, PRES.
Marilyn Mannarino, President

By: /s/ MARILYN MANNARINO
Marilyn Mannarino
("Agent" and Individually)

EXHIBIT 2

A. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
SETTLEMENT STATEMENT

B. TYPE OF LOAN
1. ☐ FHA 2. ☐ FHMA 3. ☒ CONV. UNINS.
4. ☐ VA 5. ☐ CONV. INS.
6. FILE NUMBER: TLT 06-05145
7. LOAN NUMBER: 2000911331

E. NAME & ADDRESS OF SELLER: Mark Watson, 6722 Lockmont Drive, Mansfield Heights, OH 44124

F. NAME & ADDRESS BORROWER: Anglo Funding Corporation, [illegible] Richmond Avenue N., Suite [illegible], Houston, TX 77042

G. PROPERTY LOCATION: 1126 East 170th Street, Cleveland, OH 44110

H. SETTLEMENT AGENT: Tower City Title Agency, LLC
PLACE OF SETTLEMENT: [illegible] Wilson Mills Road, Suite 110, Highland Heights, OH 44143 (440) 461-2153

I. SETTLEMENT DATE: [illegible], Final — DISBURSEMENT DATE: [illegible]/2006

J. Summary of Borrower's Transaction		K. Summary of Seller's Transaction	
100. Gross Amount Due From Borrower:		400. Gross Amount Due To Seller:	
101. Contract sales price	111,000.00	401. Contract sales price	111,000.0
102. Personal property		402. Personal property	
103. Settlement charges to borrower (line 1400)	7,449.41	403.	
104.		404.	
105.		405.	
Adjustments For Items Paid By Seller In Advance		Adjustments For Items Paid By Seller In Advance	
106. Clubhouse taxes to		406. Clubhouse taxes to	
107. County taxes to		407. County taxes to	
108. Assessments to		408. Assessments to	
109.		409.	
110.		410.	
111.		411.	
112.		412.	
113.		413.	
114.		414.	
115.		415.	
116.		416.	
120. Gross Amount Due From Borrower:	118,449.41	420. Gross Amount Due To Seller:	111,000.0
200. Amounts Paid By Or In Behalf Of Borrower:		500. Reductions In Amount Due To Seller:	
201. Deposit or earnest money	500.00	501. Excess deposit (see instructions)	
202. Principal amount of new loan(s)	[illegible]	502. Settlement charges to seller (line 1400)	1,512.0
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to	
204.		504. Payoff 1st Mtg. Ln.	
205.		505. Payoff 2nd Mtg. Ln.	
206.		506. Deposit To Seller	500.0
207.		507.	
208.		508.	
209.		509.	
Adjustments For Items Unpaid By Seller:		Adjustments For Items Unpaid By Seller:	
210. Clubhouse taxes to		510. Clubhouse taxes to	
211. County taxes [illegible] to [illegible]	937.[illegible]	511. County taxes [illegible] to [illegible]	937.[illegible]
212. Assessments to		512. Assessments to	
213. Seller Paid Closing Costs	6,660.[illegible]	513. Seller Paid Closing Costs	6,660.0
214.		514.	
215.		515.	
216.		516.	
217.		517.	
218.		518.	
219.		519.	
220. Total Paid By/For Borrower:	107,597.[illegible]	520. Total Reductions In Amount Due Seller:	9,609.[illegible]
300. Cash At Settlement From/To Borrower:		600. Cash At Settlement From/To Seller:	
301. Gross amount due from borrower (line 120)	118,449.41	601. Gross amount due to seller (line 420)	111,000.[illegible]
302. Less amount paid by/for borrower (line 220)	107,597.[illegible]	602. Less reductions in amount due seller (line 520)	9,609.[illegible]
303. Cash (☒ FROM) (☐ TO) Borrower:	10,451.[illegible]	603. Cash (☒ TO) (☐ FROM) Seller:	101,390.[illegible]

Previous Edition is Obsolete

SB-4-5538-000
HUD-1 (3-8)

Division of [illegible] Division (Line 700) As Follows:	Funds At Settlement	Funds At Settlement
701. $ to		
702. $ to		
703. Commission paid at settlement		
704.		
705. Items Payable In Connection With Loan:		
706. Loan Origination fee %		
707. Loan Discount % Acme Funding Corporation	1,396.45	
708. Appraisal fee to William J. Gryder & Associates	305.00	
709. Credit report fee		
710. Lender's inspection fee		
711. Mortgage insurance application fee to		
712. Assumption fee		
713. Tax Service Fee Tax Acme Funding Corporation	60.00	
714. Flood Certification Fee Tax First American	6.00	
715. Tax PMP To MSG Tax Acme Funding Corporation	15.00	
716. Processing Fee Tax Acme Funding Corporation	800.00	
717. Life Flood Tax First American	9.75	
718. Broker Fee Tax Vietnam Mortgage	2,150.00	
719.		
720.		
721.		
722. Items Required By Lender To Be Paid In Advance:		
723. Interest from 6/30/2006 to 10/01/2006 @$ 24.3450 /day (2 days)	48.69	
724. Mortgage insurance premium for mo. to		
725. Hazard insurance premium for 1 yr. to Tenant's Insurance	672.50	
726. Flood insurance premium for yr. to		
727.		
728.		
729. Reserves Deposited With Lender:		
730. Hazard insurance 0 months @ $ 0.00 per month		
731. Mortgage insurance 0 months @ $ 0.00 per month		
732. City property taxes 0 months @ $ 0.00 per month		
733. County property taxes 0 months @ $ 0.00 per month		
734. Annual assessments 0 months @ $ 0.00 per month		
735. Flood insurance 0 months @ $ 0.00 per month		
736. 0 months @ $ 0.00 per month		
737. Aggregate Adjustment		
738.		
739. Title Charges:		
740. Settlement or closing fee to Tower City Title Agency, LLC	300.00	300.00
741. Abstract or title search to:		
742. Title examination to Tower City Title Agency, LLC		250.00
743. Title insurance binder to Tower City Title Agency, LLC	75.00	
744. Document preparation to Tower City Title Agency, LLC	35.00	35.00
745. Notary fees to		
746. Attorney's fees to CRAIG W. SYBY, ESQ Deed Prep (includes above item Numbers:)		75.00
747. Title insurance to National City Bank/Tower City Filing Account (includes above item Numbers:)	455.40	273.42
748. Lender's coverage $[illegible] Premium $100.00		
749. Owner's coverage $111,000.00 Premium $[illegible]		
750. Address Endorsement to Tower City Title Agency, LLC	75.00	
751. SPA Endorsement to Tower City Title Agency, LLC	50.00	
752. CEMP Endorsement to Tower City Title Agency, LLC	150.00	
753.		
754. Government Recording and Transfer Charges:		
755. Recording fees: Deed $ 28.50 Mortgage $ 116.00 Releases $ 0.00	144.50	
756. Clerk's tax stamps: Deed $ 444.00 Mortgage $ 0.00		444.00
757. State tax/stamps: Deed $ 0.00 Mortgage $ 0.00		
758.		
759.		
760. Additional Settlement Charges:		
761. Survey to Mortgage & Associates	135.00	
762. Tax Inspection to		
763. Shipping & Handling to Tower City Title Agency, LLC	35.00	35.00
764. Title Transfer Fee to Tower City Title Agency, LLC	20.00	
765. Survey Coverage/Lender's Orbit to Tower City Title Agency, LLC	25.00	
766. Digital Transmission to Tower City Title Agency, LLC	25.00	
767. Special Tax/Transfer Service to Tower City Title Agency, LLC	70.00	
768. Bold Fee Final Water to Tower City Title Agency, LLC		200.00
769.		
770.		
771.		
772.		
773.		
774. Total Settlement Charge (Enter on line 103, Section J, and on line 502, Section K)	7,649.43	1,512.42

Form No. 1582 Page 2 of 3 [illegible]

carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and payments made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

...ers/Purchasers	Sellers
...r P. Edwards	Mark Watson

HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused or will cause the funds to be ...ed in accordance with this statement.

...ment Agent: _____ Date _____

Tower City Title Agency, LLC

...ENING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a ...or imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

SELLER'S TAX INFORMATION

SELLER'S CERTIFICATION OF TAXPAYER IDENTIFICATION NUMBER (substitute W-9)

...are required by law to provide the Settlement Agent (see block E) with your correct taxpayer identification number. If you do not provide your Settlement ...t with your correct taxpayer identification number, you may be subject to civil or criminal penalties imposed by law in the Tax Reform Act of 1986, ...r Internal Revenue Code Sections 6045(a), 6676, 6722, 6723 and 7203.

...r penalties of perjury, I certify that the number shown on this statement is my correct taxpayer identification number.

...f	295-74-8613	Signed:	Mark Watson
...d		Signed:	
...e		Signed:	
...f		Signed:	

Seller's Forwarding Address: 6722 Lansdowne Drive

Mayfield Heights OH 44124

PROCEEDS FROM REAL ESTATE TRANSACTIONS (substitute Form 1099-S)

...e information contained below and in blocks E, G, H and I is important tax information and is being supplied to the Internal Revenue Service. If you are ...ired to file a return, a negligence penalty or other sanction will be imposed on you if this item is required to be reported and the IRS determines that it has ...t been reported. If this real estate was your principal residence, file Form 2119, Sale or Exchange of Principal Residence, for any gain, with your income tax ...ur; for other transactions, complete the applicable parts of Form 4797, Form 6252 and/or Schedule D (Form 1040).

...ROSS PROCEEDS: $ 111,000.00

☐ Check here if the Seller received or will receive property or services as part of the consideration.

...al property tax amount reimbursed $ 0.00

PROCEEDS ALLOCATION FOR MULTIPLE SELLERS

...hen more than one seller is involved in the transfer of property, they may elect to allocate the Gross Proceeds between the named parties for the purpose of ...porting such amounts to the Internal Revenue Service. This DOES NOT apply to a husband-with relationship or to a partnership. If the proceeds are ...ated, the sum of the individual allocations must equal the total Gross Proceeds above. Use the space below or submit a sheet listing name, address, ...yer identification number, and allocation amount.

90

EXHIBIT 7

Deposition of MARILYN MANNARINO, a Defendant witness called by the Plaintiffs as if upon cross examination, taken before Donald A. Johnson, a Registered Stenotype Reporter and Notary Public within and for the State of Ohio pursuant to the Statutes and further stipulation of counsel herein contained, commencing at 10:00 o'clock a.m. on Tuesday, the 30th day of May 2006, at the law offices of Kramer & Associates LPA 3214 Prospect Avenue East Cleveland, Ohio 44115-2600

* * * * *

[66]

* * * * *

Q At any point during 1998, did anybody to the best of your knowledge undertake a formal evaluation of the company?

A First American asked for such financial information when they were in the process of buying us. I don't remember all the things they asked for. I know financials were there but I don't remember what else they asked for.

Q Do you know if they undertook a formal evaluation of the company though?

A I can't answer that. They didn't come in and go through our books, no. So I would think no.

Q Did they ask to see a copy of your corporate documents?

A Yes.

Q Your corporate book with minutes of all meetings?

[67] A I'm sorry. I'm not sure. It was a long time ago.

I know we had to give them a lot of documentation. What all it was, I'm not sure.

Q Did First American ever ask you to obtain an audited financial statement?

A No, sir.

Q Did First American ever send accountants over to look at your books?

A No, sir.

Q Prior to June 1998 or so, did Tower City Inc. conduct business with First American?

A Yes.

Q Now I have seen the name Midland Title Security Inc. It's my understanding that that is the same company as First American.

A Well, they were separate but the same. Yes, they are – I think the Midland name is just about gone now.

Q It's the operating entity of First American in Ohio?

A Was.

Q Was?

A Yeah.

Q Were there any other –

[68] MR. ROONEY: For the record, I believe it's a subsidiary.

MR. GORDON: I knew that.

A I thought they were trying to loose me, but okay, whatever.

Q So when I asked prior to June 1998 did Tower City Inc. conduct business with First American,

was it with First American or with Midland Title Security?

A No, the business we did was with First American.

Q Did you conduct any business with Midland Title Security?

A From time to time, as something here or there, but I chose to associate myself with First American.

Q You mentioned you also conducted business with Stewart Title.

A Correct.

Q A fair amount of business?

A At that time, yes. We were doing a lot of the business with Stewart.

Q It has dropped off substantially?

A We no longer write for them.

Q You said that there came a point where [69] you approached Stewart Title to acquire a portion of your business?

A Uh-huh. (Answering affirmatively)

Q How did that come about?

A Well, it came about, I was having a meeting, I believe it was with Shawn Harley who was the state manager then. And the meeting – it got back to – we maintained a very good relationship with Shawn and with the two old gentlemen that ran the company at that point. Stewart and Carlos Morris. And we had a good relationship with them.

They are nice old men, they liked us, they respected us and they were very actively seeking us at about the same level that First American had offered us.

Q When you said the two old men that ran the business, are you saying Stewart Title's operations in Ohio?

A No. Talking about Stewart Title all over the country.

Q. Okay.

A All over the country.

* * * * *

[72]

* * * * *

A I did the thing with Stewart. I went to see them, that was all, that was there. They gave us the offer.

Q What was the offer?

A $2 million. They were essentially the [73] same.

Q For 17.5%?

A Yes.

Q Of – would have been Inc.?

A Well, it would have been Inc. which was what the other one was going to be until we found out we couldn't do that, but whatever –

Q And why is it that they be wanted to – it was 17.5% exactly?

A Yes. Well, yes, that is what it turned out to be.

Q Is that a number you came up with or that –

A They came up with.

(Discussion had off the record)

Q Is that a number that you came up with?

A No. That was their number. I don't know why.

Q Stewart's number?

A Yes, and First American's number. [74]

I don't know why. Something to do with something. I don't know the answer to that, but both have the same number.

Q Did they tell you what they wanted in return for the payments to you?

A No. They were happy buying because I was making money and most title companies don't.

And that I was a good agent and my claims were good and I was honest and they knew they could deal with me.

Q Did Stewart mention to you they wanted exclusivity?

A Don't remember the words coming out, no, but that was my intention. Whoever I aligned myself with would certainly get the lion's share of my business. That would be silly not to give them that.

Q That is who you would refer the work to?

MR. ROONEY: Object legal issue.

A Yes, I would – whoever I made my choice, that is what – who I would naturally give most of the work to.

* * * * *

[80]

* * * * *

Q Okay. And then you had a meeting with [81] Mr. Stipanovich?

A Yes.

Q Do you recall specifically what you told him?

A No, I don't. I told him what the offer was; kind of not even so much for First American to maybe buy me, but what do you think about this offer.

Q Did you tell Mr. Stipanovich that you would be sending all your title business to Stewart if the deal went through?

A No. I would think he would know that, it's – it would make sense. But no, I never told him that.

* * * * *

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF TOM WAWERSICH

[filed Oct. 22, 2007]

DECLARATION OF THOMAS R. WAWERSICH

I, Thomas R. Wawersich, declare as follows:

1. I am a vice-president of First American Title Insurance Company ("FATIC") and of The First American Corporation ("FAC"). Among other things, I had responsibility for reviewing and overseeing significant proposed acquisitions of title insurance agencies by FATIC or other subsidiares of The First American Corporation (collectively, "First American"). I was involved with First American's acquisitions from 1995 though 2006.

2. FAC is a publicly traded holding company which, in addition to FATIC, owns a variety of other companies in the field of real-estate-related information services.

3. FATIC is a title insurance underter that issues title insurance policies insuring the interests of owners and lenders in real estate in 47 states and the District of Columbia.

4. FATIC sells title insurance policies though direct operations branches staffed by employees of FATIC as well as through affiliated agents and independent agents who have agency agreements to sell and issue FATIC policies.

5. First American owns some part or all (anywhere from a 1-99% share) of a small proportion of the thousands of title insurance agents across the country that are authorized to sell FATIC policies. Such agents can be considered "affiliated" agents. The vast majority of FATIC's agents are independent agents.

6. First American has no centralized process for initiating discussions or negotiations for the acquisition of an interest in a title insurance agency. Proposed acquisitions can come to us from many sources including, among others, any of the state managers, regional vice presidents, or divisional presidents across the country.

7. I would then often become involved in review, further negotiations, and legal documentation of a proposed acquisition, particularly if it was of signficant size or a more complicated transaction structure. However, smaller or less complicated ownership interests in title agencies could have been undertaken without any involvement by me or any home office personnel, and we may not have any files

in the home office in Santa Ana, California, concerning investments made by First American's field operations.

8. That First American and other title insurance companies own interests in some title insurance agents is well known to state insurance regulators. The National Association of Insurance Commssioners Form 9, Schedule T that all states require title insurance companies to use to report premium revenue includes separate columns for "non-affiliated agencies" and "affiliated agencies." Per the NAIC Practices and Procedures Manual, an "affliated agent" is presumptively defined as an agent in which First American has a 10% or greater ownership interest.

9. An agent's agreement with a title insurance underwriter may be exclusive or non-exclusive. Even agents that are "non-affliated agencies" may, and frequently do, have an exclusive agreement with a single underwriter. Dealing essentially exclusively with one title insurance company can have benefits for an agent, such as making the agent's production process less complicated, requiring the agent's personnel to work with and become familiar with only one set of underwriters working for the title company who can advise them on title issues, and the like. In addition, many non-affiliated agents may be de facto exclusive to one company, even though the agency agreement does not require it, simply because the agent chooses to operate that way.

10. On the other hand, some agents that are now affiliated agents were exclusive to FATIC well before First American acquired any stake in the agency. Further, so-called exclusive agency agreements – even with affiliated agents – are rarely completely exclusive. These agents usually keep at least one

other agency agreement with another title insurance company and retain the right to write policies on other companies upon the occurence of certain events. These events may include situations where a customer requests the policy of a different company, where a different company refers the business to the agent, in situtions where FATIC refuses to allow the issuance of a policy for some reason or in situations where there is a preexisting agency commitment on the part of the agent.

11. An agency agreement that FATIC would enter into with a title insurance agent in which First American was buying a partial interest would be similar to agency agreements currently in use in that state. Forms of agency agreements that FATIC uses are often quite different from state to state.

12. The agreements by which First American acquires interests in agencies are not simple "form" documents but are individual agreements that are the result of arm's length negotiations, usually involving counsel for the selling agent. Each principal agreement usually also has a variety of other ancillary agreements that are to be executed in connection with the closing of the sale.

13. The terms by which First American negotiates an acquisition will also be individually negotiated.

(a) The price payable will be very different depending on the size and profitability of the agency, the extent of the interest being acquired, the rights First American will have under the agreement, and a variety of other factors.

(b) An agreement may, but will not necessarily, include among other similar provisions (i) rights of first refusal if First American or the other owners propose to sell their interests, (ii) put and call rights

whereby First American can sell its interest to the other owners or buy the remaining interests in the agency, (iii) put and call rights whereby the other owners can sell their interests to First American or buy the remaining interests in the agency, (iv) come-along or drag-along rights allowing or sometimes requiring First American and the other owners to participate proportionally if the other owners of the agency or First American, as the case may be, propose to sell interests in the agency to additional investors, or (v) covenants not to compete (when permitted by state law) to prevent the other owners from competing with the common enterprise.

(c) First American's call rights in a particular acquisition are often structured to permit a phased purchase of the entire agency over time, so that the consideration paid for the initial ownership interest cannot be considered alone but must be evaluated as part of the potential purchase of the entire agency.

(d) An agreement may, but will not always, give First American a right to representation on the agency's board of directors or board of managers.

(e) An agreement will also often contain super-majority voting requirements or unanimous consent rights, so that First American will have the ability to either control or block signficant decisions or new undertakings of the business beyond its nominal percentage ownership interest, and these rights also affect the valuation of the interest.

14. Our legal department has been working to identify the title agencies that issue FATIC policies in which FAC or one of its direct or indirect subsidiaries owns an equity interest less than 100 percent. They are also working toward compiling the acquisition documents relating to such agencies.

Tentatively, we have identified approximately 180 title agencies that may fit this description. However, we have files on only approximately a third of these agencies in the home office. Further investigation may reveal that some of the 180 do not fit the description, and it is also possible that we will identify other agencies to consider.

15. The 180 entities are spread across at least 34 states. Some are recent acquisitions while others were acquired 20 or more years ago. The interest may be held directly by First American Title Insurance Company or by lower-tier subsidiaries (which, in turn, may only be partially owned by First American). For example, Affiliated Services, LLC (in which FATIC owns a 49.5% interest) and First American Title Holding Company (which is 27.46% owned by FATIC) each own partial interests in title agencies.

16. In addition, for some of these 180 entities, the company that acquired the partial interest was not an FAC subsidiary at the time of the acquisition, but rather became affiliated with FAC after the fact.

17. First American has previously divested its interest in some of these approximately 180 entities.

18. The files that we have in the home office of First American in Santa Ana, California, on the one third or so of the title insurance agencies described above would relate only to the initial acquisition. Files relating to the on-going governance, finance, business, and operations of the agency, if any, would be located out in state, regional, or divisional offices that dealt with that agency. In addition, we do not have in the home office the acquisition files for the remaining partially owned agencies. We have begun canvassing the divisional offices to locate any acquisition or operations files, but this process is likely to

take considerable time because of the highly decentralized structure of First American Title Insurance Company, the long period of time over which these acquisitions occurred, and employee turnover in the affected field offices since the acquisitions occurred.

19. I have also obtained information from FATIC's accounting department relating to Tower City, LLC. I understand from the accounting department that Tower City distributed dividend payments to FATIC in 1999, 2000, 2001, 2002, and 2003, as follows:

1999:	$133,000
2000	$61,425
2001	$171,500
2002	$101,500
2003	$115,500

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Ana, California, this 22nd day of October, 2007.

/s/ THOMAS R. WAWERSICH
Thomas R. Wawersich

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF KEITH KLEIN

[filed Oct. 22, 2007]

DECLARATION OF KEITH KLEIN

I, Keith Klein, declare as follows:

1. I am an attorney with Bryan Cave LLP and counsel of record for Defendants. I am informed and believe that the following facts set forth in this declaration are true and correct.

2. Exhibit 1 is a collection of true and correct copies of pages 1, 7, 18-21, 66, 124, 135, and 188 of the deposition of Marilyn Mannarino of Tower City Title Agency, LLC ("Tower City"), taken on May 30, 2006, in the action entitled Shahan v. Tower City Title Agency, Inc. et al., Case No. 1:05 cv 1983, United

States District Court for the Northern District of Ohio. This document was produced by Tower City and designated "confidential," therefore, Defendants will file this document under seal after obtaining an order from the Court.

3. Attached hereto as Exhibit 2 is a true and correct copy of the Tower City Title Agency, LLC Privacy Policy signed by Denise Edwards.

4. Attached hereto as Exhibit 3 is a true and correct copy of the First American Privacy Policy signed by Denise Edwards.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Santa Monica, California, this 22nd day of October, 2007.

/s/ KEITH KLEIN
Keith Klein

EXHIBIT 2

Tower City Title Agency, LLC
Trust – Confidence – Tradition

6151 Wilson Mills Road
Highland Heights, Ohio 44143
www.towercity.com

440.461.2133
800.782.5723
Fax 440.461.1245

TOWER CITY TITLE AGENCY, LLC PRIVACY POLICY STATEMENT

We Are Committed to Safeguarding Customer Information

In order to better serve your needs now and in the future, we may ask you to provide us with certain information. We understand that you may be concerned about what we do with such information – particularly your personal or financial information. You have a right to know how we will utilize the personal information you provide to us. Therefore, Tower City Title Agency, LLC, which consists of Tower City Title Agency, Inc. and First American Title Insurance Company, a subsidiary of its parent Corporation, First American Corporation, we have adopted this Privacy Policy to govern the use and handling of your personal information.

Applicability

This Privacy Policy governs the use of the information, which you provide to us. It does not govern the manner in which we may use information we have obtained from any other source, such as information obtained from a public record or from another person or entity. Our parent Company, First American, had adopted broader guidelines that govern the use of

personal information, regardless of its source. These guidelines are known as Fair Information Values, available on First American's website, which is www.firstam.com

Types of Information

Depending upon which of our services is being utilized, the types of nonpublic personal information we may collect include:

- Information we receive from you on applications, forms and in other communications to us, whether in writing, in person; by telephone or any other means;
- Information about your transactions with us, our affiliated companies, or others; and
- Information we receive, or may receive, from a consumer-reporting agency.

Use of Information

We request information from you for our own legitimate business purposes and not for the benefit of any non-affiliated party, or entity. Therefore, we will not release your information to non-affiliated parties, except: (1) as necessary for us to provide the product or service you have requested of us; or (2) as permitted by law. We may, however, store such information indefinitely, including the period after which any customer relationship has ceased. Such information may be used for internal purposes, such as quality control, or customer analysis. We may also provide all of the types of nonpublic personal information listed above to one or more of our affiliated companies, and to those whom are involved in the title, real estate, and financial services businesses. Such companies include Banks, Real Estate Agents, Mortgage

Brokers, Title Companies, and/or Title Insurance Underwriters.

Former Customers

Even if you are no longer our customer, our Privacy Policy will continue to apply to you.

Confidentially and Security

We will use our best efforts to ensure that no unauthorized parties have access to any of your information. We restrict access to nonpublic personal information about you to those entities, or individuals who need to know that information to provide products and services to you. We will use our best efforts to train and oversee our employees and agents to ensure that your information will be handled responsibly and in accordance with our Privacy Policy, and First American's Fair Information Values. We currently maintain physical, electronic, and procedural safeguards that comply with Federal regulations to guard your nonpublic personal information.

Initials: /s/ D.P.E. Initials: _____ July 2001

EXHIBIT 3

FIRST AMERICAN

[Logo Omitted]

Privacy Policy

We Are Committed to Safeguarding Customer Information

In order to better serve your needs now and in the future, we may ask you to provide us with certain information. We understand that you may be concerned about what we will do with such information – particularly any personal or financial information. We agree that you have a right to know how we will utilize the personal information you provide to us. Therefore, together with our parent company, The First American Corporation, we have adopted this Privacy Policy to govern the use and handling of your personal information.

Applicability

This Privacy Policy governs our use of the information which you provide to us. It does not govern the manner in which we may use information we have obtained from any other source, such as information obtained from a public record or from another person or entity. First American has also adopted broader guidelines that govern our use of personal information regardless of its source. First American calls these guidelines its *Fair Information Values*, a copy of which can be found on our website at www.firstam.com.

Types of Information

Depending upon which of our services you are utilizing, the types of nonpublic personal information that we may collect include:

- information we received from you on applications, forms and in other communications to us, whether in writing, in person, by telephone or any other means;
- information about your transactions with us, our affiliated companies, or others; and
- information we receive from a consumer reporting agency.

Use of Information

We request information from you for our own legitimate business purposes and not for the benefit of any nonaffiliated party. Therefore, we will not release your information to nonaffiliated parties except: (1) as necessary for us to provide the product or service you have requested of us; or (2) as permitted by law. We may, however, store such information indefinitely, including the period after which any customer relationship has ceased. Such information may be used for any internal purpose, such as quality control efforts or customer analysis. We may also provide all of the types of nonpublic personal information listed above to one or more of our affiliated companies. Such affiliated companies include financial service providers, such as title insurers, property and casualty insurers, and trust and investment advisory companies, or companies involved in real estate services, such as appraisal companies, home warranty companies, and escrow companies. Furthermore, we may also provide all the information we collect, as described above, to companies that perform market-

ing services on our behalf, on behalf of our affiliated companies, or to other financial institutions with whom we or our affiliated companies have joint marketing agreements.

Former Customers

Even if you are no longer our customer, our Privacy Policy will continue to apply to you.

Confidentiality and Security

We will use our best efforts to ensure that no unauthorized parties have access to any of your information. We restrict access to nonpublic personal information about you to those individuals and entities who need to know that information to provide products or services to you. We will use our best efforts to train and oversee our employees and agents to ensure that your information will be handled responsibly and in accordance with this Privacy Policy and First American's *Fair Information Values.* We currently maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

D.P.E.

© 2001 The First American Corporation. All rights reserved.

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

[filed Oct. 29, 2007]

---

* * * * *

MEMORANDUM OF POINTS AND AUTHORITIES

Despite Defendants' efforts to portray their kick-back and referral scheme as complex, diverse and decentralized, which include the use of discovery that has never been produced to Plaintiffs,[1] this case

---

[1] Defendants' Opposition is supported by two declarations despite their complete (and ongoing) refusal to produce witnesses for deposition or respond to Plaintiffs' written discovery, which was served on August 9, 2007. *See* Class Cert Mot. at 19-20.

focuses on one simple question: did First American violate the anti-kickback section of RESPA, 12 U.S.C. § 2607(a), by giving a "thing of value" to title agencies "pursuant to any agreement or understanding" that title insurance business would be referred to First American?

The Complaint alleges (¶¶ 3, 4-5), and Defendants *never deny*, that this scheme relied on written agreements that were at least uniform with the Tower City scheme in this respect: each agreement purchased an interest in the title agency, and First American demanded a referral agreement in return. Defendants assert repeatedly and in different ways that the negotiation of these written agreements, and the details of the various class members' settlement transactions, are individual issues that must be decided to determine if RESPA was violated. In fact, these questions are not relevant to class certification, and this Court should certify a class consisting of customers of *every* title company that entered into such an agreement with Defendants.

I. THE PROPOSED CLASS SATISFIES RULE 23(a)

A. Common Questions of Law or Fact

Rule 23(a) requires just one common issue of law or fact. *Cohen v. Chicago Title Ins. Co.*, 242 F.R.D. 295, 299 (E.D. Pa. 2007). The myriad common issues here (many raised on a *class-wide basis* by Defendants' Motion to Dismiss) include whether there were CTI agreements with each title agency; whether those agreements violate RESPA; the calculation of damages; the application of the statute of limitations;

whether there were referrals;[2] and whether title insurance is a settlement service (which although conceded by Defendants is still a class-wide legal issue). Although these points may easily be established on a class basis, each class member would have to prove each point individually were he or she to bring an individual case against Defendants. This is the essence of a "common issue" justifying class certification.

Defendants' laundry list of supposedly individualized issues at Opp. 1, 7-8 ("expert opinions on value"; the amount or form of the thing of value; FAC's role in corporate governance; other co-owners (they are not being sued); the size of the title agency; FAC's rights of first refusal) is completely irrelevant under § 2607(a). The complaint alleged the details of the Tower City transaction because, under *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007), it is essential that the plaintiff plead too much rather than too little. Nonetheless, RESPA requires only proof that FAC gave a "thing of value"; received a referral agreement; and no safe harbor applied.[3]

Similarly, the percentage of ownership (Opp. 5-6) makes no difference to the class certification issues. Neither RESPA nor HUD's regulations distinguish

---

[2] *See* Order on Motion to Dismiss, p.7 (stating that "should Edwards' allegations prove true, then both an agreement to refer settlement business and actual referrals were present").

[3] The Wawersich declaration states (¶ 6) that proposals for acquisitions can come from anyone in FAC, including "state managers, regional vice presidents, or divisional presidents." In fact, First American flew Tower City's president, Marilyn Mannarino, to FAC's Santa Ana headquarters to meet Parker Kennedy (FAC's President). Kennedy signed the document acquiring an interest in Tower City and establishing the exclusive referral agreement. Exs. 1, 7 to Class Cert Mot. at 74-75.

between a 17.5% interest and an 87.5% interest. In every case, regardless of the percentage ownership, Defendants gave a thing of value and received referrals of business in return.

Additionally, the identity of the insured under the policy is a non-issue; the class members are "consumers" of title insurance, and anyone who paid for title insurance is a class member, regardless of who is insured by the policy. *See Cohen*, 242 F.R.D. at 300. The fact that some premiums were paid by more than one person is also irrelevant. If two consumers paid for the title insurance, they are both class members and may be quickly identified from readily searchable title company information (*e.g.*, Tower City), if not from First American's records. Ex. 8 to Class Cert Mot. at 34.

Whether there was disclosure is also irrelevant because Defendants have not asserted either that their arrangements were "affiliated business arrangements" (ABAs) or that the class members received sufficient notice under the safe harbor provision of Section 2607(c)(4).[4] In any case, Tower City's "privacy policy" cannot qualify as a disclosure under the rigorous requirements of the statute or HUD's regulation, 24 CFR § 3500.15(b)(1), App. D. *See* Ex. 1 (HUD's mandatory disclosure form).

---

[4] Although Defendants attach a Tower City "privacy policy" and assert that it was distributed (Opp. 9, quoting Mannarino dep., p. 188), they omit the very next page, in which Ms. Mannarino testified that the privacy policy "is not the disclosure under RESPA, that disclosure is not needed because we are not an affiliated business." (*Id.*, p. 189, emphasis added.)

B. Ms. Edwards's Claims are Typical of the Class

Denise Edwards's claims are typical and she will "fairly and adequately" represent the class. Ms. Edwards paid for title insurance on her federally related mortgage after June 12, 2006, which was underwritten by FAC. Ms. Edwards has no damage claim different in character from any other class member. Whatever amount each class member paid will be trebled by this Court in a simple, arithmetic calculation. The *amount* of a given payment, however, is wholly irrelevant to class certification. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

* * * * *

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DEFENDANTS' ANSWER TO THE COMPLAINT

[filed Oct. 31, 2007]

COME NOW Defendants The First American Corporation and First American Title Insurance Company (collectively, "Defendants") and for their Answer state:

1. Defendants admit that Plaintiff seeks relief under 12 U.S.C. § 2601, et seq. Defendants deny the remaining allegations contained in paragraph 1.

2. Defendants deny the allegations contained in paragraph 2.

3. Defendants admit that First American Title Insurance Company ("FATIC") is a title insurance underwriter, that The First American Corporation ("FAC") is FATIC's corporate parent, that FATIC

policies are sold by title agents, and that Defendants have paid to purchase ownership interests in some title agencies. Defendants deny the remaining allegations contained in paragraph 3.

4. Defendants admit that Plaintiff seeks to represent a class of consumers. Defendants deny that Plaintiff represents such a class and deny that class treatment is appropriate.

5. Defendants deny the allegations contained in paragraph 5.

6. Defendants are without sufficient information to form a belief as to the allegations contained in paragraph 6 and therefore deny the same.

7. Defendants admit that FAC is a California corporation with its principal place of business in Santa Ana, California. Defendants deny that FAC operates across the country as FAC itself conducts no title insurance operations. Defendants admit that FATIC is a subsidiary of FAC. Defendants otherwise deny the allegations contained in paragraph 7.

8. Defendants admit the allegations contained in paragraph 8.

9. Defendants deny the allegations contained in paragraph 9.

10. Defendants admit the allegations contained in paragraph 10.

11. Defendants deny the allegations contained in paragraph 11 in light of 12 U.S.C. § 2614.

12. Defendants admit the allegations contained in paragraph 12.

13. Defendants deny the allegations contained in paragraph 13. Further answering, Defendants state that FATIC sells title insurance policies through a network of agents, but that such sales do not consti-

tute "referrals" to FATIC by the agents because they do not involve services that are distinct from the services provided by the agents (who can only sell policies issued by underwriters).

14. Defendants admit that title agents sell policies that are issued by title insurance underwriters, and that FATIC has agency agreements with a number of title agencies, including exclusive agency agreements. Defendants deny the remaining allegations contained in paragraph 14.

15. Defendants admit that FATIC purchased an ownership interest in Tower City in 1998. Defendants further admit that Tower City was a party to an agency agreement with Midland Title Security, Inc., which agreement speaks for itself, and Defendants deny Plaintiff's allegations attempting to characterize the same. Defendants deny the remaining allegations contained in paragraph 15.

16. Defendants admit that FATIC purchased a 17.5% ownership interest in Tower City for $2,000,000 in cash and FAC stock. Defendants further admit that Tower City was a party to an agency agreement with Midland Title Security, Inc, which agreement speaks for itself, and Defendants deny Plaintiff's allegations attempting to characterize the same. Defendants deny the remaining allegations contained in paragraph 16.

17. Defendants deny the allegations contained in paragraph 17.

18. Defendants deny the allegations contained in paragraph 18.

19. Defendants deny the allegations contained in paragraph 19.

20. Defendants admit that FATIC entered into a purchase agreement with Tower City, which

purchase agreement speaks for itself. Defendants deny Plaintiff's allegation to characterize the same. Defendants deny the remaining allegations contained in paragraph 20.

21. Defendants admit that FAC reported the purchase of equity interests in eleven companies and the purchase of minority interests in four companies already included in the company's consolidated financials in its 2006 10-k. Defendants further admit that First American made approximately 30 additional acquisitions in the title industry in 2006. Defendants deny the remaining allegations contained in paragraph 21.

22. Defendants are without sufficient information to form a belief as to the allegations contained in paragraph 22 and therefore deny the same.

23. Defendants admit that Tower City sold FATIC policies insuring Plaintiff's and her lender's interests in Plaintiff's property and that Tower City's offices were located at 6151 Wilson Mills Road in Highland Heights, Ohio. Defendants are without sufficient information to form a belief as to the remaining allegations contained in paragraph 23 and therefore deny the same.

24. Defendants are without sufficient information to form a belief as to the allegations contained in paragraph 24 and therefore deny the same.

25. Defendants admit that Tower City sold policies issued by FATIC insuring Plaintiff's and her lender's interests in Plaintiff's property. Defendants deny the remaining allegations contained in paragraph 25.

26. Defendants admit that Plaintiff purports to bring this action on behalf of a class. Defendants deny that the action is appropriate for class treat-

ment and deny the remaining allegations contained in paragraph 26.

27. Paragraph 27 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 27.

28. Paragraph 28 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 28.

29. Paragraph 29 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 29, including all subparts thereof.

30. Paragraph 30 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 30.

31. Paragraph 31 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 31.

32. Paragraph 32 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 32.

33. Paragraph 33 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 33.

34. Paragraph 34 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 34.

35. Paragraph 35 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 35.

36. Defendants incorporate by reference their responses to paragraph 1-35 as if fully set forth herein.

37. Defendants admit that FATIC issued title insurance policies in connection with more than a million mortgage loans during the purported class period. The remainder of Paragraph 37 states a legal conclusion, to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 37.

38. Defendants admit that Tower City, in which FATIC holds an ownership interest, sold FATIC-issued policies in connection with Plaintiff's real estate transaction. Defendants further admit that FAC and its subsidiaries held other ownership interests during the class period in title agencies that sold policies issued by FATIC. Defendants deny the remaining allegations contained in paragraph 38.

39. Defendants deny the allegations contained in paragraph 39.

40. Defendants deny the allegations contained in paragraph 40.

41. Defendants deny the allegations contained in paragraph 41.

42. Paragraph 42 (Plaintiff's request for a jury trial) requires no response from Defendants. Further answering, however, Defendants state that Plaintiff's s request for jury trial is inapplicable to Plaintiff's equitable claims, which Plaintiff seeks to certify for class treatment pursuant to Fed. R. Civ. P. 23(b)(2).

AFFIRMATIVE AND OTHER DEFENSES

Defendants hereby assert the following affirmative defenses to the allegations in the Complaint.

FIRST AFFIRMATIVE DEFENSE

(Standing)

1. Plaintiff lacks standing to bring a claim under RESPA, since she suffered no damages as a result of Defendants' alleged actions.

SECOND AFFIRMATIVE DEFENSE

(Subject Matter Jurisdiction)

2. This Court lacks subject matter jurisdiction over the claim since Plaintiff does not allege that she suffered any injury in fact that would give rise to an actual case or controversy under Article III of the U.S. Constitution.

THIRD AFFIRMATIVE DEFENSE

(Venue)

3. In light of the Court's October 11 order, venue in this Court is improper. 12 U.S.C. § 2614 requires actions under RESPA to be brought where the property is located or where the alleged violation occurred. On October 11, the Court held that the violation is alleged to have occurred at the Plaintiff's real estate closing, which took place in the State of Ohio.

FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

4. Plaintiff's claim is barred by RESPA's one year statute of limitations, 12 U.S.C. § 2614. She complains of an alleged violation that supposedly occurred in 1998, nine years before she filed suit.

FIFTH AFFIRMATIVE DEFENSE

(Failure to Join Indispensable Party)

5. Plaintiff has failed to join an indispensable party, Mark Watson, who paid a portion of the title insurance premium that Plaintiff seeks to have refunded, and whose absence subjects Defendants to a significant risk of incurring double, multiple, or otherwise inconsistent obligations, should Plaintiff prevail.

SIXTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

6. The claims of plaintiffs and members of the putative class are barred by the doctrines of waiver and estoppel.

SEVENTH AFFIRMATIVE DEFENSE

(Filed Rate Doctrine)

7. Plaintiffs' claims are barred by the filed rate doctrine.

EIGHTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

8. Plaintiffs' claims are barred, in whole or in part, on the basis that plaintiffs and/or putative class members would be unjustly enriched if they were allowed to recover certain claimed damages.

NINTH AFFIRMATIVE DEFENSE

(Fifth Amendment and Applicable State Laws)

9. Plaintiffs' claims for treble damages would violate the Fifth Amendment to the U.S. Constitution and similar state constitutional provisions because they would expose Defendants to multiple punishments and fines for the same act or conduct.

TENTH AFFIRMATIVE DEFENSE

(Due Process)

10. Plaintiffs' claims for treble damages violate the Due Process clause of the Fifth and Fourteenth Amendments to the United States Constitution in the absence of an order bifurcating those claims from the issue of liability.

ELEVENTH AFFIRMATIVE DEFENSE

(Eighth Amendment)

11. Plaintiffs' claims for treble damages are barred by the excessive fines clause of the Eighth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment.

TWELFTH AFFIRMATIVE DEFENSE

(Due Process)

12. Plaintiffs' claims for treble damages, if granted, would be grossly excessive and would violate the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. Defendants have not received fair notice that they could be subject to substantial damages in this state for the conduct alleged. Defendants conduct was not deliberate, and the treble damages sought by plaintiffs are greatly disproportionate to any actual damages and far exceed any civil or criminal sanctions that could be imposed for similar alleged misconduct.

THIRTEENTH AFFIRMATIVE DEFENSE

(Eighth Amendment and Applicable State Law)

13. Plaintiffs' claims for treble damages would violate the Eighth Amendment to the U.S. Constitution and similar state constitutional provisions because they seek to impose an excessive fine upon

Defendants, are penal in nature, and seek to punish Defendants upon vague standards.

FOURTEENTH AFFIRMATIVE DEFENSE

(Defenses Applicable to Unidentified Class Members)

14. The claims of unidentified class members may be barred by other affirmative defenses, such as estoppel, illegality, laches, payment, releases, res judicata, statute of frauds, statute of limitations, or waiver.

FIFTEENTH AFFIRMATIVE DEFENSE

(Failure to State Sufficient Facts to State a Claim)

15. Defendants are informed and believe, and based thereon allege, that each purported claim and cause of action fails to state sufficient facts to constitute a cause of action against them.

SIXTEENTH AFFIRMATIVE DEFENSE

(Reservation of Defenses)

16. Defendant reserves the right to raise such additional affirmative defenses as may be established during discovery and once the identities and residence of the putative class members are known.

WHEREFORE, Defendants respectfully request judgment in their favor, and for an award of fees and costs and such other and further relief as the Court deems proper.

Dated: October 31, 2007

Respectfully submitted,

BRYAN CAVE LLP
James Mercer
Charles A. Newman
Douglas W. King
Darci F. Madde

By: /s/ Keith D. Klein
KEITH D. KLEIN

BRYAN CAVE LLP
120 Broadway, Suite 300
Santa Monica, California 90401
Telephone: (310) 576-2100
Facsimile: (310) 576-2200

Attorneys for THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE COMPANY

STEVENS AND O'CONNELL LLP
Charles J. Stevens
400 Capitol Mall, Suite 1400
Sacramento, California 95814-4498
Telephone: (916) 329-9111
Facsimile: (916) 329-9110

Attorneys for THE FIRST AMERICAN CORPORATION and FIRST AMERICAN TITLE INSURANCE COMPANY

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

PLAINTIFF'S MOTION TO ALTER OR AMEND THE DECEMBER 10, 2007 ORDER DENYING CLASS CERTIFICATION

[filed Apr. 1, 2008]

---

* * * * *

EXHIBIT C

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF JAMES STIPANOVICH

I, James Stipanovich, declare as follows:

1. I am a former regional Vice President of First American Title Insurance Company ("FATIC"). From 1986 through approximately August 2002, I was in charge of FATIC's operations in the State of Ohio. I was also, at various times, in charge of operations in Western Pennsylvania, West Virginia and Kentucky.

2. Among other things, during this time period I had responsibility for proposing, reviewing and overseeing significant proposed acquisitions of title insurance agencies by FATIC. In my experience with FATIC, its "acquisition" protocol, when it involved the acquisition of a minority interest in a title agency, was used to obtain referrals of business from title

agents without the expectation of receiving a portion of the profits.

3. I was directly involved in the discussions concerning FATIC's acquisition of 17.5% of Tower City Title Agency, LLC in 1998.

4. During my time working for FATIC, and afterwards, FATIC actively sought the purchase of interests in title agencies in cities around the country. In each instance that I am familiar with, the goal for FATIC was the same; namely, to buy a portion of the title agency and in return, secure a referral agreement that required the title agency in the future to send all or substantially all of its title insurance business to FATIC.

5. Most of the title agency acquisitions during my tenure resulted in FATIC owning a minority interest in the title agency – typically between 10 and 20%.

6. The purchase price varied somewhat from transaction to transaction. The deals that I am familiar with resulted in payments to the title agents of between a few hundred thousand dollars (on the low end) and $2 million (on the high end).

7. In every such minority acquisition that I am aware of, once FATIC engaged a title agent in "acquisition discussions," FATIC followed the same protocol. First, FATIC would request the agent to produce a minimal number of corporate documents: (1) five years of profit and loss statements; and (2) a current balance sheet. As part of FATIC's standard protocol, these documents would then be forwarded to Donald Kennedy and/or Parker Kennedy and/or Tom Wawersich (one of FATIC's Vice-Presidents), and/or Gary Kermott (who was in operations and later became President of FATIC), all of whom were located in FATIC's corporate office in Santa Ana,

California and were involved in FATIC's title agency acquisitions.

8. Next, either Donald Kennedy or Parker Kennedy or Mr. Wawersich or Mr. Kermott, or all of them, would review the documents and, in consultation with the local FATIC operations personnel, assess:

a. The premiums generated to date from that title agent; and

b. The additional premiums that were expected to be generated by that title agent if FATIC (i) purchased an interest in the title agency, and (ii) obtained an exclusive agency agreement.

While profits may have been a consideration in the valuation of the title agency in a minority acquisition, as a matter of corporate policy, profits to be generated by the title agency were not a primary consideration in FATIC's acquisition process. FATIC was interested only in acquiring the increased premiums generated by the exclusive agency agreement. FATIC had little interest in receiving the profits generated by the venture.

9. Parker Kennedy, FATIC's former President, and Mr. Kennedy's father, Donald Kennedy were both quite involved in the title agency acquisition process. Mssrs. Wawersich and Kermott, after reviewing the information described above, would make a recommendation on the acquisition to either Parker or Donald Kennedy, or both. It was my understanding, based on discussions with other FATIC officers and employees, that the Kennedys were the final decision-makers when it came time for FATIC to decide whether to go forward with the acquisition of a minority interest in a title agency, subject only to Board of Director approval.

10. Over the years I have had numerous conversations with both Parker Kennedy and Donald Kennedy. It was during one of these conversations that Parker Kennedy told me that in the standard process used by FATIC to acquire minority interest in title agencies, FATIC makes clear to the agent that FATIC does not worry about reaping any of the profits from the agency; FATIC enters into these arrangements to obtain the premiums resulting from the exclusive referral of title insurance business.

11. When entering into a purchase agreement to acquire a minority interest in a title agency, the most important document from FATIC's prospective was the "Agency Agreement." It was through the "Agency Agreement" – which was typically included as an exhibit to the purchase agreement – that FATIC required the title agents to refer title policies "exclusively" to FATIC. This was true even if the agent had previously sent business, as was typical, to multiple title insurance underwriters. In addition, it is my recollection that the purchase agreement, as well, included language requiring the title agent to refer future title insurance business exclusively to FATIC.

12. Typically the purchase agreement provided for FATIC to have a say in the management of the title agency. Because the focus of the acquisition was obtaining referrals of title insurance business, however, FATIC rarely participated in a meaningful way in management decisions of the title agency *after* the acquisition was completed. No one at FATIC emphasized or seemed to care about participating in the management of the ventures resulting from the minority interest acquisition.

13. The acquisition of a 17.5% interest in Tower City Title Agency in October, 1998, followed the same established and uniform protocol, as outlined above.

14. Prior to the acquisition in October 1998, Tower City was appointed by, and therefore issued policies on behalf of several different title insurance companies including FATIC and Stewart Title Guaranty, and perhaps others. It is my recollection that in the period preceding the acquisition, Tower City referred title insurance business to each of these underwriters.

15. Sometime in 1998, Marilyn Mannarino, the President and one of the owners of Tower City, approached me and advised that she was considering an offer from Stewart Title for the acquisition of a minority interest in Tower City.

16. FATIC asked Ms. Mannarino to consider selling the minority interest in Tower City to FATIC, because FATIC was concerned about the loss of Tower City's title insurance premiums, and in response to an apparent interest by Stewart Title in purchasing a similar minority interest (which was communicated to FATIC by Ms. Mannarino). Under FATIC's offer, FATIC would purchase a 17.5% interest in Tower City in return for a payment of $2 million to Tower City's principals. As part of this deal, it was understood that Tower City would also agree to an exclusive Agency Agreement, that would require Tower City to referral all of its future title insurance business to FATIC.

17. In response to this proposal, Tower City gathered and provided to FATIC unaudited profit and loss statement for the years 1994 through 1998. These documents were forwarded to Tom Wawersich.

18. In order to convince Ms. Mannarino to accept FATIC's proposal, FATIC flew Ms. Mannarino to FATIC's corporate office in Santa Ana, California. During her visit to FATIC in Santa Ana, Ms. Mannarino had lunch with Parker Kennedy.

19. Upon her return from Santa Ana, Ms. Mannarino advised me that she had decided to accept FATIC's acquisition offer. That is, Ms. Mannarino and the other principals of Tower City would be paid $2 million in cash and securities and in return would "sell" FATIC a 17.5% interest in Tower City Title Agency. As part of the arrangement, like all of the other minority title agency acquisitions by FATIC, Tower City agreed to execute an exclusive "Agency Agreement."

20. I recall that in the Tower City acquisition, Ms. Mannarino insisted on one minor exception to exclusivity. Tower City, prior to the acquisition had conducted title and escrow work for one lender that insisted that the title policy be issued through Stewart Title. Thus, it is my recollection that the Tower City Agency Agreement contains a minor "carve-out" that permitted Tower City to underwrite a limited number of policies with Stewart Title under certain circumstances. It is also my recollection that this "carve-out" resulted in very few, if any, policies being referred to Stewart Title and that, as explained to me by Ms. Mannarino, Stewart eventually terminated Tower City's agency agreement.

21. I am aware of other agency acquisitions that followed the same protocol as the Tower City transaction. Some of these acquisitions occurred while I worked for FATIC and others, after.

22. For example, I am familiar with FATIC's acquisition of minority interests in: (a) Kentucky

Land Title Agency, Inc., located in Ft. Mitchell, Kentucky; (b) Security Land Title, located in Omaha, Nebraska; (c) Performance Title Agency, Inc., located in Blue Ash, Ohio; (d) Progressive Land Title Agency, Ltd., located in Independence, Ohio; and (e) Title Xperts Agency, Inc., located in Cleveland, Ohio.

23. In each of these acquisitions, like the acquisition of the 17.5% interest in Tower City, FATIC had one primary objective – to increase FATIC's net premiums. FATIC did so by paying each of the above title agents a sum of money (or by giving them some other thing of value) to secure an agency agreement that required the title agency in the future to refer all or substantially all of its title insurance business to FATIC.

24. Based upon what I saw and on what I was told by other FATIC officers and employees, FATIC's "acquisition" of an interest in each of the companies identified above, including Tower City, was predicated upon securing additional (and maintaining the existing) premium without regard to distribution of profits.

25. In August 2002, I resigned my position at FATIC and accepted a similar position with Old Republic National Title Insurance Company in Independence, Ohio.

I HEREBY DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed at Independence, Ohio, this 18th day of February, 2008.

/s/ JAMES STIPANOVICH
James Stipanovich

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF A TOWER CITY CLASS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEREOF

[filed Apr. 21, 2008]

---

* * * * *

III. ARGUMENT

* * * * *

B. This Court Should Certify The Proposed Class In This Case

1. The Proposed Class Plainly Meets Each Requirement of Rule 23(a)

* * * * *

c. Plaintiff Edwards' Claims Are Typical

Rule 23(a)(3) requires that "the claims or defenses of the [Named Plaintiffs be] typical of the claims or defenses of the class." The standard is "permissive." *Hanlon, supra*, 150 F.3d at 1020. A Plaintiff's claim is typical if "the unnamed class members have injuries similar to those of the named plaintiffs and . . . the injuries result from the same, injurious course of conduct." *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

Of course, "typical" does not mean "identical." *Armstrong*, 275 F.3d at 869; *see also In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 304 (E.D. Pa. 1980) (slight factual distinctions between the named Plaintiff's and absent class members' claims do not undermine typicality). *See also Reynoso v. South County Concepts, Inc.*, 2007 WL 4922524 at *3 (C.D. Cal. Oct. 26, 2007) (typicality met if named plaintiff's claim is "reasonably coextensive with those of absent class members; they need not be substantially identical") (*quoting Hanlon v. Chrysler, supra*). Rather, courts focus on the defendants' conduct and the plaintiff's legal theory. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

The bottom line is that the typicality requirement is liberally construed. *See Hanlon*, 150 F.3d at 1020. When Plaintiffs allege that the same unlawful conduct was directed at or affected both the named Plaintiff and the class, the typicality requirement is usually satisfied. *Smith v. Univ. of Wash. Law Sch.*, 2 F.Supp.2d 1324, 1342 (W.D. Wash. 1998) ("[t]ypicality turns on the defendant's actions toward

the plaintiff class, not particularized defenses against individual class members").

Given these standards, the facts underlying the Named Plaintiff's claims against Defendants are plainly typical of the claims of the proposed Class. Like all Class members, Ms. Edwards closed on a federally related mortgage loan. Like all Class members, a title agent – Tower City, the same agency in every transaction – that had previously entered into a CTI Agreement with Defendants, performed title and settlement services for Ms. Edwards. Like all Class members, Defendants underwrote Ms. Edwards' title insurance policy. In addition, like all Class members, Ms. Edwards' HUD-1 – a standard settlement form used by every title agent – contained a payment to Defendants for title insurance. **Exh. 2**, ln. 1108 (HUD-1 Settlement Statement). In short, every Class member's claim is based on the same conduct by Defendants – Defendants' CTI Agreement with Tower City which required Tower City to refer title insurance business to Defendants – and relies on the same legal theory – *i.e.*, that payment of more than $2 million for referrals of business violated RESPA. The Named Plaintiff's claim is, therefore, not only *typical* of the Class claims in this case, it is identical.

* * * * *

DATED: April 21, 2008

LAW OFFICES OF JAMES W. SPERTUS

By: /s/ JAMES W. SPERTUS
James W. Spertus
Lawrence Jones
LAW OFFICES OF
JAMES W. SPERTUS
12100 Wilshire Blvd, Suite 620
Los Angeles, California 90025
Telephone: (310) 826-4700
Facsimile: (310) 826-4711

Cyril V. Smith
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
Telephone: (410) 949-1145
Facsimile: (410) 659-0436

Richard S. Gordon
Martin E. Wolf
QUINN, GORDON & WOLF, CHTD.
102 West Pennsylvania Avenue,
Suite 402
Baltimore, Maryland 21294
Telephone: (410) 824-2300
Facsimile: (410) 825-0066

Edward G. Kramer
David Oakley
THE FAIR HOUSING LAW CLINIC
3214 Prospect Avenue, East
Cleveland, Ohio 44115
Telephone: (216) 431-5300
Facsimile: (216) 431-6149

Attorneys for Plaintiffs

EXHIBIT 5

DEPOSITION OF THOMAS R. WAWERSICH
TUESDAY, APRIL 1, 2008

* * * * *

[47]

* * * * *

Q. Now, have you seen the form of the agency agreement before? Is this a fairly standard form for a First American agreement?

[48] A. My understanding is that agency agreements vary from state to state, so this probably is the standard form for Ohio.

Q. Okay. And what is the date on it?

A. September 1994.

Q. And would you agree it predates the acquisition of the minority interest in Tower City by roughly four years?

A. Yes.

Q. And is it your understanding that Tower City, Inc. was an existing agent of First American for those four years?

A. This document certainly leads me to believe that, yes.

Q. Is this an exclusive or a nonexclusive agency agreement?

A. On the seventh or eighth line of this document it says, "The appointment of Agent hereunder is on a nonexclusive basis." Then it goes on to say other things.

Q. What does a "nonexclusive agency" mean?

A. That it's not exclusive.

Q. That it can conduct business with other title insurance companies?

A. Yes.

[49] Q. And that Tower City under the agency agreement could, for example, be appointed as a title insurance agent for as many title insurance companies as it wants?

A. Correct.

Q. And that it was not bound to refer any title insurance policies to one title insurer or any other?

A. Correct.

* * * * *

[90]

* * * * *

BY MR. GORDON:

Q. And there's also an agency agreement in here, is there not?

A. I believe there is.

Q. That's on page 283, it begins.

A. Yes.

Q. And this agency agreement would be modifying the 1994 agency agreement that we looked at as Deposition Exhibit Number 13, correct?

MR. KING: Objection as a legal conclusion as to "modifying."

BY MR. GORDON:

Q. Do you know what I mean by that, Mr. Wawersich?

A. I suppose it could be any of a number of things. I mean if you want – if you want to ask

me another question, I would be happy to try and answer it.

Q. Okay. Do you have any understanding as to whether Tower City went from a nonexclusive agency to an exclusive agency with First American when the 1998 agency agreement was executed?

A. On the one, two, three, four – fifth line down of the – of paragraph 1, "Appointment," it says that, "Agent," in this case Tower City Title Agency, LLC, "agrees to promote and perform exclusively for Midland [91] and/or First American."

Q. And what does "exclusively" mean with respect to this agreement?

A. I believe that it means only, but with certain exceptions.

Q. Okay. "Only" meaning that if a consumer's transaction is closed in a way that a title insurance policy is issued as a result of the transaction, that title insurance policy will be underwritten by First American; is that correct?

A. If it's – if the hand – if the transaction is handled through Tower City Title Agency, LLC.

* * * * *

EXHIBIT 6

VIDEOTAPED DEPOSITION OF TODD JONES

IRVINE, CALIFORNIA

WEDNESDAY, APRIL 2, 2008

* * * * *

[47]

* * * * *

Q Is the title commitment the next stage?

A Yes.

Q And what is the title commitment?

A It's a typed version of the examiner's notes.

Q Okay. And that's what we were discussing before where the information that's put into a computer system is then printed onto a title commitment form?

A Yes.

Q And who issues the title commitment?

A The title agent.

Q And is this, again, a process that the borrower's involved in?

A Up to this point, no.

Q Okay. And isn't it typically the agent who determines which title insurer is going to be underwriting title insurance?

A Yes.

* * * * *

[Attorney Information Omitted]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3796 SJO (FFMx)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff,

v.

THE FIRST AMERICAN CORPORATION, ET AL.,
Defendants.

DECLARATION OF BRIAN J. RECOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

[filed May 5, 2008]

DECLARATION OF BRIAN J. RECOR

I, Brian J. Recor, declare as follows:

1. I am an attorney with Bryan Cave LLP and counsel of record for Defendants. I make this declaration in support of Defendants' opposition to Plaintiff's motion for class certification.

* * * * *

5. Attached hereto as Exhibit E is a collection of true and correct copies of pages 1, 56-57, 65-68, and

90 of the deposition of Denise Edwards, taken on April 8, 2008, in this action.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Santa Monica, California, this 5th day of May, 2008.

/s/ Brian J. Recor
Brian J. Recor

* * * * *

EXHIBIT E

Videotaped deposition of
DENISE P. EDWARDS

April 8, 2008
12:59 p.m.

* * * * *

[62]

Q. Now, as far as what happened in 1998 with Tower City, do you know whether that cost you one penny more for title insurance than you would have paid if that stuff in 1998 had never happened?

A. No.

Q. Do you have both the initial letter from Mr. Oakley and the agreement that you signed with your lawyers in your files at home?

A. I believe so.

Q. And if called upon to produce those in connection with this case, you could do that because you still have copies of them?

A. Yes.

Q. Were you ever involved in any other lawsuit involving Tower City?

A. No.

Q. Did you ever receive any kind of notice from the court or the lawyers about any other lawsuit involving Tower City?

A. No.

Q. Have you ever heard of the Shayhan case?

A. No, sir.

Q. Did you receive any part of a [63] settlement payment involving the Shayhan case?

A. No, sir.

Q. What would you get out of this case if you won?

A. Well, to my knowledge, three time – not property – the cost of title insurance, and justice for the other people.

Q. Would you still have your title insurance policy?

A. Yes.

Q. Speaking of justice, does that seem fair to you, that you would get back all the money that you paid for the title insurance but still keep the policy?

A. Yes, because is it fair that they do what they do to get people to get their insurance policy through them.

Q. Well, do you know whether you would have paid the exact same amount if you had gone to any other title insurance company doing business in the state of Ohio?

A. No, because I believe that – I didn't have the opportunity to.

Q. Well – but suppose you had had the opportunity and you had shopped around. Do you [64] know whether you would have found that the prices are, in fact, the same for title insurance premiums among all of the companies?

A. Why, yes. I mean, just the fact that I shopped around, I made the decision to choose a certain title company is kind of difficult to just be given – I mean, just for you not having any decisions on what you choose.

Q. You're talking about the fact that Tower City showed up at the closing?

A. Yes.

Q. And so what you're concerned about is how did Tower City get into the deal; is that it?

A. Yes.

Q. But you don't know how they got into the deal?

A. No.

Q. You know, though, that you didn't do anything to try to find a title agency, you just left it up to Cresthaven to find one for you?

A. Well, I did ask. I did ask them shouldn't I be doing these things myself.

[65] Q. And they said, "We'll take care of it"?

A. Yes.

Q. And you left it at that, right?

A. Yes.

Q. So I asked you a while back what would you get if you won this case. You said three times the premium. Anything else?

A. That I represent other people, that I stood up for something that's right, fair, equal opportunity mean a lot to me.

Q. Okay. Has anyone suggested to you that you could get an incentive payment for serving as the class representative in the case?

A. No.

Q. Do you know what a complaint is in the context of filing a lawsuit?

A. Yes.

Q. What's that?

A. Someone's complaining about some type of work or something that was done to them.

Q. Well, I'm talking about a document.

A. No.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

[filed Nov. 10, 2008]

MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendants-Appellees, First American Title Insurance Company and The First American Corporation (collectively "First American"), move under Rule 27(a) Fed. R. App P. to dismiss these appeals for lack of jurisdiction. This Court lacks jurisdiction because Plaintiff-Appellant, Denise P. Edwards ("Edwards"), has no constitutional or prudential standing in that she has suffered no injury-in-fact caused by First American that is redressable in federal court. In support of its motion, First American states:

* * * * *

ARGUMENT

I. Edwards Has Not Been Injured Within the Meaning of Either Article III or RESPA and Thus Lacks Standing To Sue.

* * * * *

A. Edwards Does Not Have Constitutional Standing.

* * * * *

21. Ohio is a rating bureau state that allows title insurance companies to delegate their rate-filing obligations to a rating bureau, which then files the exact same rates for all of the title insurance underwriters. *See* Ohio Rev. Code § 3935.04 (stating that insurers may satisfy the rate filing obligation by becoming a member of a licensed rating bureau which makes such filings); Ohio Rev. Code § 3935.07 ("Every member of, or subscriber to, a rating bureau shall adhere to the filings made on its behalf by the bureau . . . .").

* * * * *

Dated: November 10, 2008

By: /s/ K. LEE MARSHALL
BRYAN CAVE LLP
Charles A. Newman
Douglas W. King
K. Lee Marshall
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
canewman@bryancave.com

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

[filed Dec. 11, 2008]

DEFENDANTS-APPELLEES' REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

Defendants-Appellees The First American Corporation and First American Title Insurance Company (collectively, "First American") respectfully submit their reply in support of their motion to dismiss for lack of jurisdiction.

I. Edwards Failed To Satisfy the Constitutional Requirement of a Concrete, *De Facto* Injury Regardless of Whether Congress Created a Cause of Action in the Absence of an Overcharge.

* * * * *

While the Court recognized that statutes may create legal rights, "the invasion of which creates standing," the Court expressly limited that principle to circumstances in which Congress elevates "to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." [*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).] *See also Doe v. Nat'l Bd. Of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("Although Congress can expand standing by enacting a law enabling someone to sue on what was already a *de facto* injury to that person, it cannot confer standing by statute alone."); * * *

* * * * *

* * * In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), the Court recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules," but stated that "Art. III's requirement remains: the plaintiff must still allege a distinct and palpable injury to himself." In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982), the Court correctly found that individuals who had been subjected to false and racially discriminatory statements about housing availability suffered "specific injury" within the meaning of Article III. The Article III requirement of a concrete, *de facto* injury of *Lujan* is entirely consistent with Edwards' cases.

Edwards' citation to cases under the Fair Debt Collections Practices Act ("FDCPA") does not aid the constitutional calculus. In the FDCPA, Congress recognized that "abusive, deceptive, and unfair debt collection practices . . . contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of privacy." 15 U.S.C.

§ 1692(a). The FDCPA imposes liability regardless of whether a valid debt exists. *Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (citing 1977 U.S.C.C.A.N. 1695, 1696); *see also* 123 Cong. Rec. 10241 (1977) ("every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner"). The FDCPA thus does no more than recognize that a concrete, *de facto* injury – like the harassing letters and calls of *Baker* without any pecuniary loss – is a legally cognizable injury redressable in federal court. *See Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208 (10th Cir. 2006) (plaintiff subjected to unlawful attorneys' fees claim, although no award made, had standing to sue under FDCPA).

* * * * *

II. Edwards Admits that She Did Not Pay Any Additional Premium to First American.

* * * * *

Third, Edwards claims that dismissing this case would have the effect of exempting alleged RESPA violations in all "filed-rate jurisdictions" ([Opp. at 11.]). Edwards is wrong. This argument ignores the enforcement powers of state and federal regulators under 12 U.S.C. 2607(d)(4). More to the point, it would only apply where the plaintiff has suffered no injury; there may be other RESPA claims where the plaintiff can allege actual injury. Finally, it is only in the few rating bureau or promulgated rate states where the title premium is the same for all underwriters, not all filed rate states.

* * * * *

Date: December 11, 2008

By: /s/ CHARLES A. NEWMAN
BRYAN CAVE LLP
Charles A. Newman
Douglas W. King
K. Lee Marshall
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2000
Facsimile: (314) 259-2020
canewman@bryancave.com

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case Nos. 08-56536, 08-56538

In the Court Below: CV 07-3796 SJO (FFMx)
(C.D. Cal.)

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

[filed Mar. 24, 2009]

OPPOSITION OF THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANTS-APPELLEES TO MOTION OF NATIONAL ASSOCIATION OF INDEPENDENT LAND TITLE AGENTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

---

* * * * *

EXHIBIT A

Videotaped deposition of
DENISE P. EDWARDS

April 8, 2008
12:59 p.m.

* * * * *

[38]

* * * * *

Q. Did anyone at the closing tell you that in Ohio there's one rating bureau that files the same premium rates for all of the title insurance companies?

A. No.

Q. Well, if Dean had told you at the closing that the prices from all of the title insurance companies are the same for the same kind of policy, would it have mattered to you which title company you went to?

A. It would if it cost me a little less then.

Q. Right. What I'm saying is if Dean had told you it's going to cost you the same whether you go to First American or Stewart or Commonwealth or Fidelity because they all have [39] the same rates for title insurance, then would it have mattered to you which company you got a policy from?

A. No.

Q. Do you remember anything else that happened at the closing on September 29th besides what we've talked about up to now?

A. No.

Q. So you got the keys and moved right in?

A. That weekend, so it might have been October the 2nd.

Q. Was there a reason to wait until October 2nd?

A. No, because, actually, it was probably a Friday or I probably was waiting until the weekend to move. It was all of a sudden, so I had to hurry up and get things – get a U-Haul, get people to help move me.

Q. Have you talked to anybody from Tower City since the day of the closing?

A. No.

Q. Other than getting the deed and the policy in the mail from Tower City, have you had any other written communication to or from [40] anybody from Tower City since then?

A. No.

Q. Have you ever talked to anybody with First American Title Insurance Company?

A. No.

Q. Other than the policy itself, have you ever received anything in writing from First American Title Insurance Company?

A. No.

Q. Were you, in October of 2006, pleased to be a new homeowner?

A. Yes.

Q. At that point, in October of 2006, did you have any complaints about the process of getting your loan approved and having the closing and getting you into the house?

A. I'd – problems had came, occurred, but it wasn't regarding – it was through Cresthaven regarding the title company.

Q. Sorry. I don't know whether you told me whether or it wasn't or it was regarding the title company.

A. No, it wasn't regarding that. It was based on other issues.

Q. What other issues?

[41] A. Knowing that my house insurance wasn't included.

Q. I'm sorry. What wasn't included.

A. Will had came to my house for a payment for house insurance, but I thought that was all included. So that's the other things that –

Q. You're talking about homeowner's insurance?

A. Yes.

Q. And you thought you had already paid for that but Will was saying you need to pay some more?

A. Yes.

Q. So that was one thing that you were a little bit upset about?

A. Yeah.

Q. Okay. But as far as the work that Tower City did and the policy that it provided to you back in October of 2006, did you have any complaints about any of that?

A. No.

* * * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-56536 & 08-56538

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Defendants-Appellees.

[filed Apr. 1, 2009]

BRIEF FOR THE FIRST AMERICAN CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY, DEFENDANTS-APPELLEES

---

* * * * *

ARGUMENT

THIS COURT SHOULD VACATE THE ORDERS BELOW AND INSTRUCT THE DISTRICT COURT TO DISMISS THIS CASE FOR WANT OF SUBJECT MATTER JURISDICTION OR, ALTERNATIVELY, SHOULD AFFIRM THE DENIALS OF CLASS CERTIFICATION

* * * * *

III. There In No Subject Matter Jurisdiction In The Federal Courts For Edwards' Claim

* * * * *

A. Having Sustained No Injury-in-Fact When She Paid Ohio's Uniform Title Insurance Premium, Edwards Lacks Article III Standing

* * * * *

3. By Mistakenly Equating a RESPA Violation With a RESPA Injury the District Court Misapplied the Supreme Court's Requirement of a "Concrete and Particularized" Injury-in-Fact

* * * * *

Contrary to the district court's analysis, Congress does not have authority to create "injuries that are the basis for standing." 517 F.Supp. 2d at 1202 (ER 21). Congress has the authority to create legal rights. Congress also has the authority to provide that, *if a private party sustains injury* as a result of the violation of those statutorily-created rights, the private party shall have a statutory remedy. * * *

* * * * *

* * * An unlawful referral, given to an individual title insurance purchaser, may be *an individualized violation*, but that does not make it *an individualized injury*. A violation of the law which does not cause injury does not satisfy Article III. *Lujan*, 504 U.S. at 578.

The *Carter* court analogized rights under RESPA to the right to truthful information about the availa-

bility of housing under the Fair Housing Act. 553 F.3d at 989. But this analogy fails. The purpose of the Fair Housing Act is to support diversity and to eradicate prohibited discrimination. *Havens*, 455 U.S. at 373. The denial of accurate information about housing necessarily causes non-economic injury, not only because the Fair Housing Act itself created a statutory right to accurate information, but because unless all persons are provided accurate information about the availability of housing, the non-economic rights of all to enjoy the benefits of an integrated society are harmed.

* * * * *

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLASS CERTIFICATION

* * * * *

B. Common Questions Do Not Predominate

* * * * *

3. A Nationwide Class Action Would Involve Individualized Determinations Concerning Each Agreement Between First American and 180 Different Title Agencies

* * * * *

Nothing in RESPA prohibits payments in any particular form, including the form of purchasing an ownership interest in a title agency.[17] * * *

---

[17] There are no *per se* rules applying RESPA section 8 to non-controlling investments by title companies in title agencies. The RESPA statute and HUD's regulations establish specific rules addressing "affiliated business arrangements." 12 U.S.C. § 2607(c)(4); 24 C.F.R. § 3500.15. But these rules do not prohibit First American's investment in Tower City because Tower City did not own more than one percent of FATIC, 12 U.S.C. § 2602(7), and FATIC did not have "effective control over"

* * * * *

4. Individualized Inquiry Would Also Be Necessary On Additional Facts

* * * * *

Another individualized issue identified by the district court is whether disclosures were made to putative class members and what effect they had on class members' actions. (ER 6 n.4). Edwards alleges that First American's ownership interest in Tower City was "secret" and "undisclosed" (ER 94-95 ¶¶ 3, 5), but First American proffered unrebutted evidence showing that the relationship between the two was disclosed to her in writing. (ER 419-20 ¶ 3 & 423-24). The evidence also shows that Edwards and every Tower City customer received, or should have received, a privacy policy statement that disclosed the affiliation between First American and Tower City. (ER 472 at 188:1-189:16). Whether a disclosure was received and signed, when the disclosure was received, what was said about the disclosure, and related questions will be additional individual issues that must be proven for each class member. (ER 5 n.3).

* * * * *

Dated: April 1, 2009

Tower City, 24 C.F.R. § 3500.15(c)(2). There is no evidence that First American "controlled" Tower City as defined in 24 C.F.R. § 3500.15(c)(4). To the contrary, the record reflects that First American did not control Tower City; for instance, HUD's control test would be met if First American owned 20 percent of Tower City (24 C.F.R. § 3500.15(c)(4)(ii)), but First American owned only 17.5 percent of Tower City. (ER 462-63).

Respectfully submitted,

/s/ CHARLES A. NEWMAN
Charles A. Newman

SONNENSCHEIN NATH & ROSENTHAL LLP

Charles A. Newman
cnewman@sonnenschein.com
Michael Duvall
mduvall@sonnenschein.com
One Metropolitan Square
Suite 3000
St. Louis, MO 63102-2741
314-259-5399;
Fax: 314-259-5959

Paul E. B. Glad
pglad@sonnenschein.com
525 Market Street – 26th Floor
San Francisco, CA 94105-2708
415-882-5001;
Fax: 415-882-0300

Richard M. Zuckerman
rzuckerman@sonnenschein.com
Kenneth A. Pfaehler
kpfaehler@sonnenschein.com
Lydia Keaney
lkeaney@sonnenschein.com
1221 Avenue of the Americas
New York, New York 10020
212-398-5213;
Fax: 212-768-6800

Attorneys for The First American Corporation and First American Title Insurance Company, Defendants-Appellees

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

June 20, 2011

Mr. Aaron M. Panner
Kellogg, Huber, Hansen, Todd,
Evans & Figel P.L.L.C.
1615 M St., N.W.
Suite 400
Washington, DC 20036

Re: First American Financial Corporation,
Successor in Interest to The First
American Corporation, et al.
v. Denise P. Edwards
No. 10-708

Dear Mr. Panner:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted limited to Question 2 presented by the petition.

Sincerely,

/s/ WILLIAM K. SUTER
William K. Suter, Clerk

PETITIONER'S BRIEF

RECORD
AND

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

August 22, 2011

Supreme Court
Law Library

QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

On June 20, 2011, the Court granted the petition for a writ of certiorari, limited to the following question:

In the absence of any claim that the alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company state the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

A. Statutory and Regulatory Background 3

B. Nature and History of the Action 6

SUMMARY OF ARGUMENT 12

ARGUMENT 18

I. THE NINTH CIRCUIT'S DECISION DISREGARDS THE CONSTITUTIONAL NATURE OF THE STANDING REQUIREMENT UNDER ARTICLE III 18

II. EDWARDS FAILED TO ALLEGE INJURY 26

A. Edwards Alleged No Concrete Injury 26

1. Edwards Alleged No Pecuniary Injury 26

2. Edwards Alleged No "Informational" Injury 29

3. Edwards Alleged No Other Injury Sufficient To Establish Standing To Sue 32

B. Edwards Cannot Establish Standing Based Merely on the Allegation That First American Violated RESPA in Connection with Her Settlement Transaction 37

III. ENFORCEMENT OF ARTICLE III'S STANDING REQUIREMENT SERVES INTERESTS THAT ARE CRITICAL TO THE ADMINISTRATION OF JUSTICE AND SEPARATION OF POWERS 42

CONCLUSION 46

ADDENDUM:

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*:

§ 2, 12 U.S.C. § 2601 ..... 1a

§ 3, 12 U.S.C. § 2602 ..... 2a

§ 4, 12 U.S.C. § 2603 ..... 5a

§ 5, 12 U.S.C. § 2604 ..... 6a

§ 6, 12 U.S.C. § 2605 ..... 9a

§ 8, 12 U.S.C. § 2607 ..... 20a

§ 12, 12 U.S.C. § 2610 ..... 24a

§ 16, 12 U.S.C. § 2614 ..... 24a

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 19, 20, 28, 30, 31

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 44

Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436 (2011) 42

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 28, 37, 43

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) 17, 44

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 17

Bennett v. Spear, 520 U.S. 154 (1997) 42

Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011) 41

City of Boerne v. Flores, 521 U.S. 507 (1997) 16, 22

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 27

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 18, 19

Doe v. Chao, 540 U.S. 614 (2004) 38

FEC v. Akins, 524 U.S. 11 (1998) 14, 15, 29, 30, 31, 37, 38

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 12, 14, 19, 29

Gerlinger v. Amazon.com Inc., 526 F.3d 1253 (9th Cir. 2008).....28, 33

Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123 (9th Cir. 2006) 34

Gollust v. Mendell, 501 U.S. 115 (1991).....12, 21, 33

Harley v. Minnesota Mining & Mfg. Co., 284 F.3d 901 (8th Cir. 2002) 35

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 12, 15, 21, 30

Heckler v. Chaney, 470 U.S. 821 (1985) 45

Heckler v. Mathews, 465 U.S. 728 (1984)..... 30-31

Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996)..... 35

Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450 (3d Cir. 2003)..... 35

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 34

LaRue v. DeWolff, Boberg & Assocs., Inc., 552 U.S. 248 (2008) 34

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 36

Linda R.S. v. Richard D., 410 U.S. 614 (1973)..... 22

Loren v. Blue Cross & Blue Shield of Michigan, 505 F.3d 598 (6th Cir. 2007) 34, 35

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12, 13, 15, 16, 19, 20, 23, 24, 36, 38, 39, 40

Massachusetts v. EPA, 549 U.S. 497 (2007).....15, 16, 24, 38, 39, 40

McCullough v. AEGON USA, Inc., 585 F.3d 1082 (8th Cir. 2009)..... 34

Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) 33

Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) 15, 30, 31

Raines v. Byrd, 521 U.S. 811 (1997).....20, 42

Senior Cottages of Am., LLC, In re, 482 F.3d 997 (8th Cir. 2007)..... 31

Sierra Club v. Morton, 405 U.S. 727 (1972)..... 39

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 28

Sprint Communications Co. v. APCC Servs., Inc., 128 S. Ct. 2531 (2008) 12, 21, 25, 38

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 39

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 12, 13, 18, 19, 20, 23, 37

Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009) 12, 16, 19, 22, 23, 36, 39, 40

Texaco Inc. v. Dagher, 547 U.S. 1 (2006) 28-29

Tumey v. Ohio, 273 U.S. 510 (1927)..... 36

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 17, 20, 37, 46

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 12, 13, 17, 19, 20, 24, 25, 40, 44

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 43

Warth v. Seldin, 422 U.S. 490 (1975).....11, 13, 21, 22, 23, 28

Whitmore v. Arkansas, 495 U.S. 149 (1990) 19

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Art. III.....1, 8, 10, 12, 14, 16, 18, 19, 21, 22, 23, 24, 26, 28, 29, 32, 34, 37, 39, 42, 44

Amend. V (Due Process Clause)..... 39

Communications Act of 1934, 47 U.S.C. § 151 *et seq.* 21

Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001 *et seq.* 20

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 34

29 U.S.C. § 1104(a)..... 34

29 U.S.C. § 1109(a)..... 34

29 U.S.C. § 1132(a)(2)..... 34

Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884..... 20

Fair Housing Act, 42 U.S.C. § 3601 *et seq.* 30, 31

§ 804(d), 42 U.S.C. § 3604(d) (1982) 30

False Claims Act, 31 U.S.C. § 3729 *et seq.* 25

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015..... 5

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724, codified as amended at 12 U.S.C. §§ 2601-2617.....*passim*

§ 2(a), 12 U.S.C. § 2601(a) 40

§ 2(b)(1), 12 U.S.C. § 2601(b)(1) 32

§ 2(b)(1)-(2), 12 U.S.C. § 2601(b)(1)-(2) 3

§ 2(b)(2), 12 U.S.C. § 2601(b)(2) 8, 14, 26, 41

§ 3(3), 12 U.S.C. § 2602(3) 3

§ 3(7), 12 U.S.C. § 2602(7) 5

§ 4, 12 U.S.C. § 2603..... 4, 31

§ 4(a), 12 U.S.C. § 2603(a) 31

§ 5(c), 12 U.S.C. § 2604(c) 4, 32

§ 5(d), 12 U.S.C. § 2604(d) 4, 32

§ 6, 12 U.S.C. § 2605..... 4

§ 6(f), 12 U.S.C. § 2605(f)..... 4, 5

§ 8, 12 U.S.C. § 2607.....5, 18, 32

§ 8(a), 12 U.S.C. § 2607(a) 1, 4, 7, 10, 14, 16, 31, 32, 33, 41, 44

§ 8(c)(1)(B), 12 U.S.C. § 2607(c)(1)(B) 4

§ 8(c)(4), 12 U.S.C. § 2607(c)(4) 5, 31

§ 8(d), 12 U.S.C. § 2607(d)..... 44

§ 8(d)(1), 12 U.S.C. § 2607(d)(1) 5

§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 5, 10, 13, 18, 24, 25, 40, 43

§ 8(d)(4), 12 U.S.C. § 2607(d)(4) 5

§ 8(d)(5), 12 U.S.C. § 2607(d)(5) 5

Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) 21

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1292(b) 10

Ohio Rev. Code:

§ 3935.04(A) 5

§ 3935.04(B) 5

§ 3935.04(H) 5

§ 3935.06 5

§ 3935.07 5

§ 3953.25 45

§ 3953.26 45

Sup. Ct. R. 15.2 27

Fed. R. Civ. P. 23(f) 10

LEGISLATIVE MATERIALS

120 Cong. Rec. 6586 (Mar. 13, 1974) 41

H.R. Rep. No. 97-532 (1982) 41-42

S. Rep. No. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546 41

ADMINISTRATIVE MATERIALS

Press Release, *HUD Settles Allegations that Prospect Mortgage Violated RESPA and FHA Reporting Requirements*, HUD No. 11-146 (July 13, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-146 44

OTHER MATERIALS

Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159 (2011) 40

William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988) 23

Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009) 45

Joyce D. Palomar, *Title Insurance Law* (1999 & Supp. 2010) 5, 45

2 *Records of the Federal Convention of 1787* (M. Farrand ed., rev. 1966) 18

Restatement (Second) of Agency (1958) 35

Restatement (Third) of Agency (2006) 35

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 25, 30

Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689 (2004) 25

INTRODUCTION

Article III requires a private plaintiff to demonstrate standing to sue, including an actual or threatened injury that was caused by the defendant's allegedly illegal conduct and that would be redressed by a decision in the plaintiff's favor. The obligation to demonstrate standing applies in litigation against private parties, not just against the government, and Congress cannot relieve a plaintiff of the obligation to establish standing by affording that plaintiff a right to sue, even if Congress provides a monetary recovery for victory in the suit. The Ninth Circuit's decision – which equated the existence of a statutory right of action with the injury required to establish standing – cannot be reconciled with these principles, which are firmly established in this Court's jurisprudence.

Edwards's complaint should therefore have been dismissed. She did not allege – as was her burden – any actual injury. Edwards claimed only a violation of § 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), which prohibits referral fees or kickbacks. One complaining of an illegal kickback could plead injury if she received service at a higher price or of lower quality than was available elsewhere, but Edwards does not allege that those things happened to her. Nor did Edwards properly allege any "informational injury," both because the violation alleged was not a failure to disclose (as Edwards conceded below) and because she did not properly allege that she wanted information for any purpose or even for its own sake. Edwards insists, instead, that she suffered an invasion of her interest in obtaining a "referral" free of the "taint" of an unlawful kickback. But "taint" is

just another word for illegality: in the absence of an impact on the plaintiff, an alleged violation, standing alone, does not establish injury. Congress's power to make actionable *de facto* injuries that were not previously legally cognizable does not entail the power to deem a legal violation a "*per se*" injury – even in the absence of adverse effects on the plaintiff – and thereby relieve a plaintiff of her constitutional obligation to establish injury in fact.

The Constitution's standing requirement has a special practical importance in a putative class action like this one. The consequence of allowing individuals with no injury to be plaintiffs, and to sue for damages set by statute and not tied to any actual loss, is to allow the aggregation of large numbers of claims, giving rise to vast potential liability and undermining the just adjudication of claims. Standing doctrine is crucial in defining the proper sphere of judicial power and in preserving the separation of powers, concerns that are fully implicated in this case. For all these reasons, the Court should reverse the judgment and direct the dismissal of the complaint.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion to dismiss for lack of standing (App.[1] 1a-7a) is reported at 610 F.3d 514. The memorandum of the court of appeals addressing the district court's denial of respondent's motions for class certification (App. 8a-11a) is not reported (but is available at 2010 WL 2617588). The

---

[1] "App. _a" refers to the appendix filed with the certiorari petition, and "JA_" refers to the Joint Appendix filed with this brief.

order of the district court denying petitioners' motion to dismiss (App. 12a-22a) is reported at 517 F. Supp. 2d 1199. The orders of the district court denying respondent's motions for class certification (App. 23a-30a, 31a-40a) are reported at 251 F.R.D. 449 and 251 F.R.D. 454.

JURISDICTION

The court of appeals entered judgment on June 21, 2010, and denied a petition for rehearing and rehearing en banc on August 30, 2010 (App. 41a). The certiorari petition was filed on November 23, 2010, and was granted, limited to the second question presented, on June 20, 2011 (JA165). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724, codified as amended at 12 U.S.C. §§ 2601-2617, are reproduced in the Addendum, *infra*, at 1a-25a.

STATEMENT

A. Statutory and Regulatory Background

1. Congress passed RESPA in 1974, subjecting the settlement process for residential real estate transactions to federal regulation. RESPA's stated goals include, among other things, "more effective advance disclosure to home buyers and sellers of settlement costs" and "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(1)-(2). "Settlement services," for purposes of RESPA, encompass "any service provided in connection with a real estate settlement," including "title insurance." *Id.* § 2602(3).

RESPA creates numerous mandatory disclosure procedures for settlement services. These include standardized settlement forms, *see id.* § 2603; a requirement that lenders provide borrowers an advance estimate of costs, *see id.* § 2604(c); information booklets printed by the Secretary of Housing and Urban Development ("HUD"), which real estate lenders must distribute to borrowers, *see id.* § 2604(d); and disclosures by lenders about the ways in which loans can be and are assigned, sold, and transferred, *see id.* § 2605. A violation of RESPA § 6, 12 U.S.C. § 2605, is not a crime, but gives rise to a private action for actual damages, or statutory damages of up to $1,000 if there is a "pattern or practice of noncompliance"; in a class action, statutory damages are subject to an additional cap of $500,000 or one percent of the defendant's net value. *Id.* § 2605(f).

Section 8 of RESPA prohibits any "person" from giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). There are several safe-harbor exceptions to this bar. Among them are "the payment of a fee . . . title company to its duly appointed agent for s actually performed in the issuance of a polic itle insurance," *id.* § 2607(c)(1)(B); and "affili business arrangements" so long as (A) the arrangements are disclosed to the person who is referred, (B) that "person is not required to use any particular provider of settlement services," and (C) nothing of value is "received from the arrangement" except for "a return on [an] ownership interest or franchise relationship" and certain

other permitted payments, *id.* § 2607(c)(4); *see id.* § 2602(7) (defining "affiliated business arrangement").

A violation of § 8 is a crime punishable by imprisonment of up to one year or a fine of up to $10,000. *Id.* § 2607(d)(1). HUD, any state attorney general, and any state insurance commissioner may also bring actions to enjoin violations. *Id.* § 2607(d)(4). In addition, a private party who is "charged for the settlement service involved in [a] violation" may bring an action to recover "three times the amount of any charge paid for such settlement service," plus "reasonable attorneys fees." *Id.* § 2607(d)(2), (5). Unlike § 6(f), § 8(d)(2) imposes no cap on the damages that may be awarded in a class action.

2. Title insurance is also regulated under various state laws.[2] In this case, the relevant state is Ohio. Insurance rates in Ohio, including title insurance premium rates, must be "file[d] with the [state] superintendent of insurance." Ohio Rev. Code § 3935.04(A). Once a rate is filed, an Ohio insurer may not "make or issue a contract or policy except in accordance with the filings which are in effect for the insurer." *Id.* § 3935.04(H). An insurer may ask the superintendent for permission to use a different rate, but must make an application in writing before charging that rate. *See id.* § 3935.07.

An Ohio insurer may either file its own rate or become a member of a state-licensed rating bureau that files rates for all of its members. *See id.* §§ 3935.04(B), 3935.06. At the time relevant to this case, all licensed title insurers in Ohio were members of the Ohio Title Insurance Rating Bureau ("OTIRB").

---

[2] *See generally* Joyce D. Palomar, *Title Insurance Law* ch. 18 (1999 & Supp. 2010); *see also* 15 U.S.C. §§ 1011-1015 (McCarran-Ferguson Act).

JA38. Accordingly, the rates for title insurance filed for every title insurer in Ohio were identical. *See* App. 14a (noting that Edwards "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price").

B. Nature and History of the Action

1. First American[3] is among the largest title insurance underwriters in the country. Its policies are often issued through title insurance agents who act on behalf of First American. Some agents may issue those policies exclusively or preferentially.[4] First American owns an interest in some, but not all, of the title insurance agents with which it does business. JA99-100. The fact that First American and other title insurance underwriters own interests in some of their respective title insurance agents is disclosed in public filings available to state insurance regulators, state attorneys general, and HUD. JA99.

In November 1998, First American acquired a 17.5% ownership share in Tower City Title Agency LLC ("Tower City"), a title agent in Ohio. JA62, 70. At the time of the acquisition, Tower City agreed to issue policies for First American as its agent. Tower City's agency was nominally "exclusive[]," but was

---

[3] In this brief, "First American" refers to petitioner First American Title Insurance Company, except where it refers to actions taken in the litigation, in which case it refers generically to petitioners First American Financial Corp. (as successor in interest to The First American Corp.) and First American Title Insurance Company.

[4] A "preferential" arrangement, as we use the term, is one in which an agent agrees to issue policies for First American not exclusively, but under certain specified circumstances – for example, to do so unless the customer requests another underwriter.

subject to "exception[s]." JA72. In particular, Tower City could issue policies for Stewart Title Guaranty Co. as necessary to maintain its relationship with that competitor of First American. *Id.* And, more broadly, Tower City was permitted to fulfill any customer "require[ments]" for policies issued by other underwriters. *Id.*

2. On or about September 29, 2006, respondent Denise P. Edwards purchased a home in Cleveland, Ohio. *See* App. 50a, 53a (Compl. ¶¶ 6, 22). Edwards obtained title insurance for her home purchase through Tower City, which issued policies on behalf of First American. *See* App. 53a-54a (Compl. ¶¶ 24-25). Edwards paid $455.43 towards the purchase of the policies (one for her lender and one for herself); the seller of her home paid $273.42. *See* App. 54a (Compl. ¶ 24) (alleging that this amount was paid as "premiums for title insurance"); JA89 (HUD-1 form, line 1108). Edwards has never contested that the amount she paid was compliant with the applicable rate of the OTIRB then on file with the Ohio superintendent of insurance. At the time of her closing, Edwards received and initialed a privacy policy notice that disclosed an affiliation between Tower City and First American. JA106-08.[5]

3. On June 12, 2007, Edwards filed a putative class-action complaint in the Central District of California, claiming, as its only count, a violation of RESPA § 8(a). Her original complaint remains the operative complaint in the case. Edwards alleged that First American had paid a "kickback" to Tower

---

[5] The policy stated that "Tower City Title Agency, LLC . . . consists of Tower City Title Agency, Inc. and First American Title Insurance Company, a subsidiary of its parent Corporation, First American Corporation." JA106.

City to obtain an exclusive agency relationship. The alleged kickback consisted of: (1) an excessive price for First American's share of Tower City, paid in 1998; and (2) an additional cash payment from First American to Tower City in 2004. *See* App. 51a-52a (Compl. ¶¶ 15-16). Edwards further alleged, on information and belief, that First American had other, similar arrangements around the country. *See* App. 53a (Compl. ¶ 21).

Edwards alleged that First American's "referral agreements have . . . injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated – to quote Congress's words from 1974 – 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)). Similarly, she alleged that the challenged practices had "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market." App. 52a (Compl. ¶ 17). She did not, however, claim that the exclusive agency agreements in fact caused her, or anyone else, (1) to pay more for title insurance; (2) to receive lower-quality services; or (3) to incur any other kind of economic, physical, or psychological harm.

4. First American moved to dismiss the complaint for lack of subject matter jurisdiction, contending that Edwards had failed to plead any injury as required by Article III, and also that Edwards had failed to state a cause of action and lacked statutory standing. The district court denied the motion. Although it recognized – and Edwards did not dispute – "that the cost of title insurance in Ohio is regulated so that all insurance providers charge the

same price," App. 14a, it nevertheless found standing. It held that, in enacting RESPA, "Congress created a right to be free from referral-tainted settlement services" and that First American's alleged violation of this right amounted to a "statutory injury" sufficient to support standing. App. 19a.

After the district court's order, the parties engaged in discovery relevant to class certification. Edwards was deposed about her RESPA claim and testified that the only reason she would have cared about which title insurer she used was if another would have "cost [her] a little less." JA157.[6] She also testified, however, that she did not know whether the alleged kickback scheme would have "cost [her] one penny more for title insurance than [she] would have paid" otherwise. JA146. She also denied having any "complaints" about "the work that Tower City did and the policy that it provided to [her] . . . in October of 2006." JA159.[7]

---

[6] *See also* JA157 ("Q: . . . [I]f [you] had [been] told . . . it's going to cost you the same whether you go to First American or Stewart or Commonwealth or Fidelity because they all have the same rates for title insurance, then would it have mattered to you which company you got a policy from? A: No.").

[7] At the certiorari stage, the Solicitor General contended that Edwards's admissions were not properly before the Court because the Court should limit its consideration of the facts to those alleged in the complaint. *See* U.S. Inv. Br. 19-20. This Court can and should decide the case on the basis that Edwards has not even *alleged* that she paid more for or was otherwise dissatisfied with her title insurance policy. Nevertheless, to avoid any implication that Edwards is the victim of a technical pleading mistake, it is fair to add that Edwards could not – according to her own testimony – truthfully allege any such harm.

In two orders on December 10, 2007, and June 6, 2008, the district court denied certification of a nationwide class of all persons who bought title insurance from First American and a narrower class of all persons who bought title insurance from First American through Tower City. *See* App. 23a-40a. The court also denied Edwards's motion for reconsideration of the denial of certification of the nationwide class.

5. The Ninth Circuit accepted review under Federal Rule of Civil Procedure 23(f) (not 28 U.S.C. § 1292(b) as stated in the court's opinion). *See* App. 2a; JA14, 24. In a published opinion, it addressed both the statutory question whether RESPA authorized Edwards's suit, given that she had allegedly been referred to a title insurer in violation of § 8(a), but had not paid any more as a result of that alleged violation; and the constitutional question whether she had appropriately pleaded the injury in fact required by Article III.

The court of appeals held that RESPA did authorize Edwards to sue, relying primarily on the language in § 8(d)(2) that permits recovery of "three times the amount of any charge paid" for a settlement service that was "involved in [a] violation." App. 5a (quoting 12 U.S.C. § 2607(d)(2)) (emphasis and internal quotation marks omitted). The court reasoned that Congress's "use of the term 'any' demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.*; *see also* App. 5a-7a (discussing RESPA's statutory history).

The court of appeals further held that the fact that RESPA created a cause of action for First American's

alleged conduct sufficed, without more, to create a statutory injury that gave Edwards constitutional standing to sue. *See* App. 5a ("Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III."), 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."). To support this reasoning, it relied mainly on *Warth v. Seldin*, 422 U.S. 490 (1975). It believed that, under *Warth*, the appropriate question to ask was "whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500, *quoted in* App. 4a.

In an unpublished memorandum, the Ninth Circuit reversed most of the district court's orders denying respondent's motion for class certification and effort to undertake nationwide discovery. *See* App. 8a-11a. It held that the district court should have certified a class of persons in Ohio who purchased First American title insurance from Tower City. It also concluded that the court should have permitted respondent to conduct nationwide discovery to support her effort to obtain certification of a nationwide class of purchasers of title insurance from First American under arrangements resembling those alleged in the complaint.

First American sought rehearing and rehearing en banc, which the Ninth Circuit denied on August 30, 2010. *See* App. 41a.

6. First American petitioned for a writ of certiorari, which this Court granted, limited to the constitutional question whether "a private purchaser of

real estate settlement services" who, like Edwards, does not "claim that [an] alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided" has "standing to sue under Article III." *See supra* p. i.[8]

SUMMARY OF ARGUMENT

I. The Ninth Circuit's conclusion that, "[b]ecause RESPA gives Plaintiff a statutory cause of action, . . . Plaintiff has standing," App. 7a, conflicts with the principle, repeatedly reaffirmed by this Court, that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Article III standing requires injury in fact, causation, and redressability, as set forth in cases such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); and *Summers v. Earth Island Institute*. That requirement applies in suits against private parties, *see, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Steel Co.*; it applies in cases when Congress has authorized the plaintiff to sue, *see, e.g.*, *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Friends of the Earth*; *Steel Co.*; *Lujan*, and it is not restricted to "citizen suits" but applies as well to statutory claims that, in many applications, resemble traditional tort causes of action, *see, e.g.*, *Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Because Article III

---

[8] After this Court granted certiorari, the district court stayed further proceedings.

is a *constitutional* limit on jurisdiction, its requirements are not met merely because a statute provides a plaintiff a cause of action.

The Ninth Circuit's contrary holding was based on its misreading of *Warth v. Seldin*, 422 U.S. 490 (1975). *Warth* did not hold that, in cases involving statutory rights, standing can be determined solely by asking whether Congress meant to authorize a suit. If it had, *Warth* could not be reconciled with this Court's later holdings in *Lujan* and *Steel Co.*, which make clear that the Constitution does not allow Congress to authorize suit without injury in fact. Indeed, *Warth* itself clarified that, even after Congress has authorized suit, "Art[icle] III's requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself." 422 U.S. at 501. This Court has never held – in *Warth* or elsewhere – that a congressional authorization to sue relieves federal courts of their obligation to ensure that every plaintiff properly alleges injury in fact.

The fact that RESPA authorizes recovery of settlement fees (trebled) does not create an injury in fact. This Court has rejected the notion that a plaintiff's interest in receiving a recovery authorized for successful litigants suffices to create standing; rather, a concrete interest apart from that created by the suit itself must be at stake. *See Vermont Agency*, 529 U.S. at 772. The basis for standing in *qui tam* suits is the assignment by the United States to the relator of a part of its claim for concrete, pre-suit injury. By contrast, § 8(d)(2) does not address any pecuniary injury to the United States, and thus cannot relieve plaintiff of the obligation to demonstrate a concrete, pre-suit injury to herself.

II. Edwards has failed to allege an injury in fact.

A. Edwards alleged that "all members of the proposed plaintiff class" were "injured . . . in precisely the same way" – that is, by being "den[ied] . . . critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)). Despite the complaint's references to both "cost" and "information," Edwards did not allege either a pecuniary injury or an "informational" injury sufficient to establish standing under Article III.

1. Edwards did not plead that, as a result of the alleged violation of § 8(a), she was charged a higher price for title insurance than otherwise would have been available. Any such allegation would in any event fail because, under the state regulatory regime in place in Ohio, she had no lower-priced insurance option. All title insurers in Ohio, as members of OTIRB, charged identical rates. Moreover, Edwards did not allege that she received poor service or lower-quality insurance at all, much less as a result of the alleged conduct.

Edwards's complaint cannot survive because of the supposed "systemic" effects of the practice alleged in the complaint on the title insurance industry as a whole. The potential for an undefined, non-specific "systemic" effect is precisely the type of "conjectural" claim of harm that cannot support Article III standing. *Id.* Edwards does not allege any increase in title insurance costs or explain how such an increase would be "fairly traceable" to the conduct challenged here. *Friends of the Earth*, 528 U.S. at 180.

2. Edwards likewise cannot allege any "informational" injury. This is not a case, like *FEC v. Akins*,

524 U.S. 11 (1998), or *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), in which the plaintiff's injury is the denial of information that Congress has required the government to provide to protect citizens' ability to participate in the process of democratic governance. Nor is this case like *Havens Realty*, in which the claimed violation is based on the provision of false information, and the resulting injury includes racial insult and stigma. Edwards does not allege anything like that here: the sole purpose for which she claims she wanted the information was to avoid the potential for financial injury, which she did not suffer.

3. Nor did Edwards allege any injury comparable to that which would support a claim for breach of a duty of loyalty or (as the government has argued) a violation of conflict-of-interest rules. Edwards did not allege that she was betrayed by a trusted advisor or her agent, and, in any event, the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm. And a violation of a procedural right, like the right to an unbiased adjudicator, supports standing only when the deprivation of the procedural right impairs a separate, concrete interest.

B. The argument that Edwards suffered an invasion of her right to settlement services free of the "taint" of unlawful conduct does not identify any impact on Edwards apart from the alleged violation. Congress can create legal rights, the invasion of which can give rise to a legally cognizable injury, *see Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), but it does so by "elevating to the status of legally cogniza-

ble injuries concrete, *de facto* injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578. Congress cannot eliminate the injury-in-fact requirement by designating the experience of a legal violation a *"per se"* injury, irrespective of its effect on any individual plaintiff. To recognize such fictitious injuries would effectively eliminate the "hard floor" requirement that Article III imposes and would allow Congress to evade the separation-of-powers limits that Article III protects. *Summers*, 129 S. Ct. at 1151; *cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Moreover, notwithstanding the fact that the statute broadly confers a cause of action on any person whose settlement services were "involved in the violation" of § 8(a), the statute does not "'define'" any new "'injur[y]'" or "'articulate'" any new "'chain[] of causation,'" *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), that would give rise to a case or controversy in the absence of actual injury to the plaintiff. To the contrary, the text and history of the statute indicate that the interests protected by the prohibition on referral fees are economic interests, not any other intangible interest. This conclusion underscores the constitutional inadequacy of the supposed injury alleged.

III. Enforcement of the Article III standing requirement serves interests that are critical to the administration of justice and separation of powers. The class-action context of this case underscores the importance of requiring the allegation (and, eventually, proof) of a well-defined injury in fact. Edwards's experienced class counsel may well have calculated that RESPA can provide access to a wind-

fall recovery for a large plaintiff class if they can persuade the courts to accept a cause of action that does not depend on any concrete, individualized injury. That could explain the decision to plead a complaint that relies solely on a generic statutory injury that has nothing to do with any conduct that has made anyone worse off. Recognition of such a suit as legitimate threatens vast liability, with the *in terrorem* effect forcing settlement of even unmeritorious suits. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

The exercise of "judicial power" on behalf of litigants may "profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). It is emphatically the role of the judiciary to provide a forum for a private plaintiff to "obtain[] compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73. Where, as here, a plaintiff has suffered no actual injury, the judicial role is not implicated, and the plaintiff may not invoke the jurisdiction of the federal courts.

ARGUMENT

The Ninth Circuit held that (1) § 8(d)(2) of RESPA authorizes suit by any person who purchased a settlement service "involved in [a] violation" of § 8 of RESPA, irrespective of whether the plaintiff suffered any pecuniary harm; and (2) any plaintiff who pleads a cause of action under § 8(d)(2) has standing under Article III, simply by virtue of stating a "statutory cause of action." App. 7a. The Court granted certiorari to review the latter holding, and it should reverse.

I. THE NINTH CIRCUIT'S DECISION DISREGARDS THE CONSTITUTIONAL NATURE OF THE STANDING REQUIREMENT UNDER ARTICLE III

The Ninth Circuit concluded that, because Edwards stated a cause of action under RESPA, she had established an injury "sufficient to satisfy Article III." App. 5a. The Ninth Circuit's understanding that the existence of a statutory right of action, without more, establishes a constitutionally sufficient injury conflicts with this Court's precedent.

A. Article III of the Constitution provides that the "judicial Power" of the United States extends only to deciding "Cases" and "Controversies." Those words refer specifically to cases and controversies "that [are], in James Madison's words, 'of a Judiciary Nature,'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed., rev. 1966)), because they are "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

"[P]erhaps the most important" way in which this Court has enforced Article III's "fundamental limits on federal judicial power in our system of government" is the "require[ment] [that] a litigant . . . have 'standing' to invoke the power of a federal court." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The elements of Article III standing are "familiar: 'A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief.'" *DaimlerChrysler*, 547 U.S. at 342 (quoting *Allen*, 468 U.S. at 751); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Many of this Court's standing cases involve actions against the federal government, but the standing requirement applies as well in suits against private defendants. The need to prove Article III standing "does not depend on the defendant's status as a governmental entity." *Steel Co.*, 523 U.S. at 103 n.5; *see id.* (noting that there is "no conceivable reason" for drawing that distinction); *see also, e.g., Friends of the Earth*, 528 U.S. at 175, 180.

In this case, the principal question is whether Edwards has adequately alleged an "'injury in fact' – a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Because "the requirement of injury in fact is a hard floor of Article III jurisdiction," it "cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Injury in fact is part of the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), a "core component" of

standing that is "derived directly from the Constitution," *Allen*, 468 U.S. at 751. This "outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The fact that Congress has authorized a plaintiff to sue by granting a right of action against the defendant therefore does not, without more, satisfy the requirement of injury in fact. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."). Thus, in *Steel Co.*, the Emergency Planning and Community Right-To-Know Act of 1986 authorized suit by "any person" against the owner of a hazardous waste facility that failed to comply with the statute; notwithstanding that authorization, the Court held that the respondent lacked injury in fact and could not proceed with its suit. *See* 523 U.S. at 104-09. And, in *Lujan*, the Endangered Species Act of 1973 contained a "citizen suit" provision authorizing "any person" to "commence a civil suit on his own behalf" against the government; the Court nevertheless held that the standing requirement was not satisfied. *See* 504 U.S. at 571-73; *see also Vermont Agency*, 529 U.S. at 771-78 (assessing plaintiff's standing despite existence of express statutory right of action).

The standing inquiry is not limited to cases involving provisions that allow literally any citizen to sue to challenge unlawful conduct, but applies also in cases involving causes of action that may, in many applications, provide recovery for individuals' ordinary pecuniary losses. For example, in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), the respondents sued pursuant to the private right of action under the Communications Act of 1934; while the Court did not question that the plaintiffs had been assigned causes of action, it nevertheless determined that they were required to establish standing under Article III. *See id.* at 273-74. In *Gollust v. Mendell*, 501 U.S. 115 (1991), the Court concluded that Congress intended that a plaintiff "would maintain some continuing financial stake in the litigation," *id.* at 125, in order to maintain an action under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b); its conclusion explicitly rested on the constitutional concern that would arise on a contrary reading of the statute. In reasoning that Article III requires a plaintiff to "'allege a distinct and palpable injury to himself'" to establish standing, 501 U.S. at 126 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), the Court not only reaffirmed that Article III places a limit on Congress's ability to create standing by authorizing suit but also made clear that the limitation applies in suits under statutes that provide tort-like causes of action in situations involving individual pecuniary harm. Likewise, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), while the Court found that each plaintiff who had stated a cause of action had standing to sue, the Court made clear that Article III imposed an independent injury-in-fact requirement. *See id.* at 373-74 (finding that plaintiff had demon-

strated "specific injury" and therefore satisfied Article III).

It is the responsibility of the "federal courts to satisfy *themselves*," *Summers*, 129 S. Ct. at 1149 (emphasis added) – even in the face of legislation that grants a broad right to sue – that the party seeking judicial relief in a particular case has shown an injury. For Article III, as for other constitutional provisions that define and limit the powers of the federal government, "Congress' discretion is not unlimited, . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The Ninth Circuit's conclusion that the existence of a statutory right of action, without more, establishes an injury in fact fails to give effect to the constitutional nature of the standing requirement.

B. To support its view that the determination that Edwards stated a cause of action was sufficient to establish that she suffered an injury in fact, the court of appeals quoted this Court's statement in *Warth* that the "injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).[9] *Warth* itself, however, clarified that, even after Congress has authorized suit, "Art[icle] III's requirement remains[, and] the plaintiff still must allege a distinct and palpable

---

[9] The statement was dictum because the result in *Warth* was that none of the plaintiffs in that case had standing. *See* 422 U.S. at 517-18. It also was dictum in the footnote from *Linda R.S.* that *Warth* quoted; *Linda R.S.* also denied standing. *See* 410 U.S. at 619.

injury to himself." *Id.* at 501. This Court emphasized the need for a plaintiff to "allege specific, concrete facts demonstrating that the challenged practices harm *him*." *Id.* at 508. *Warth* thus did not hold – and this Court has never held – that a congressional authorization to sue relieves the courts of their obligation to ensure that every plaintiff properly alleges injury in fact.[10]

Warth is consistent with this Court's recognition in many later cases – including *Lujan*, *Steel Co.*, and *Summers* – that the doctrine of Article III standing imposes constitutional constraints on Congress's ability to authorize statutory actions. The statement that Article III injury "may exist solely by virtue of statutes," *Warth*, 422 U.S. at 500 (internal quotation marks omitted), does not mean that Article III injury is a solely statutory question.[11] That statement

---

[10] The Court in *Warth* then went on to explain that "the source of the plaintiff's claim to relief assumes critical importance with respect to the *prudential* rules of standing" and that "the standing question *in such cases* is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." 422 U.S. at 500 (emphases added). The Ninth Circuit deepened its error by omitting *Warth*'s reference to "prudential rules of standing" and quoting this Court's reference to "'such cases'" as though it meant cases about the limits imposed by Article III. *See* App. 4a (quoting *Warth*, 422 U.S. at 500). What *Warth* clearly meant, in context, was that, if a constitutional or statutory provision is properly read as granting a particular plaintiff a right to judicial relief, that plaintiff faces no problem of prudential standing.

[11] Critics of this Court's standing cases have taken the position apparently adopted by the Ninth Circuit, arguing that the standing inquiry should be reduced to the question whether the plaintiff has stated a claim. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 290-91 (1988). As explained in text, that approach has already been rejected by

instead refers to the principle that, where Congress has "'identif[ied] [an] injury it seeks to vindicate and relate[d] th[at] injury to [a] class of persons entitled to bring suit,'" its action may "'give rise to a case or controversy where none existed before.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). As discussed below, *see infra* Part II.B, that principle cannot help Edwards here. She did not plead any "concrete, *de facto* injur[y]," *Lujan*, 504 U.S. at 578, and Congress could not and did not establish that she suffered injury simply by virtue of the existence of an alleged violation of RESPA that did not adversely affect her.

C. The fact that § 8(d)(2) renders a statutory violator liable to the "person or persons charged for the settlement service" for "three times the amount of any charge paid for such settlement service" does not mean that a plaintiff suing under that provision automatically satisfies the constitutional injury requirement. It is true that the possibility of such a recovery constitutes a "'concrete private interest.'" *Vermont Agency*, 529 U.S. at 772 (quoting *Lujan*, 504 U.S. at 573). The hope for that windfall recovery, however, cannot satisfy Article III because it is a mere "bounty" that is "unrelated to injury in fact." *Id.* It is not "*compensation* for . . . the violation of a legally protected right," because, in such a case, the plaintiff has suffered no injury to compensate; and it will not help her to "prevent[]" injury in the future, because she has not alleged that she is threatened with any. *Id.* at 772-73 (emphasis added); *see also*

---

this Court – and rightly so, because to accept it would undermine the separation-of-powers function of the standing requirement.

U.S. Inv. Br. 12-13 n.8 (conceding that "a statutory bounty standing alone may not be sufficient to confer standing").

Edwards does not stand in the same position as the *qui tam* relator in *Vermont Agency*. The Court explained in that case that the False Claims Act's provision granting a successful relator a portion of the government's recovery is sufficient to give the relator standing because the statute "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, such that "the United States' injury in fact suffices to confer standing." 529 U.S. at 773-74; *see also Sprint*, 554 U.S. at 285 (holding, based on "history and precedent," that an assignee for collection has standing).[12] Here, by contrast, Edwards has not alleged that *anyone* has suffered a pecuniary injury by virtue of the challenged transaction, much less that she brings her claim as an assignee or the functional equivalent.

---

[12] The action authorized by § 8(d)(2) does not resemble the informer statutes enacted by the First Congress either. *See Vermont Agency*, 529 U.S. at 776-77 & n.6 (listing statutes). Such statutes shared with an informer some of the debt or fine owed to the United States as a result of a legal violation. In each such case, the United States has a pecuniary interest and the plaintiff can be understood to have been assigned a portion of it – the very rationale that was the principal basis for upholding the False Claims Act in *Vermont Agency*. Here, by contrast, the United States has no pecuniary interest to assign. *See also* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 726-27 (2004); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 n.20 (1993) (noting that "[p]ractice prior to the framing of the Constitution – and perhaps constitutionally dubious remnants persisting thereafter – . . . is not an infallible guide to the scope of judicial power under Article III").

II. EDWARDS FAILED TO ALLEGE INJURY

A. Edwards Alleged No Concrete Injury

The allegations of injury in Edwards's complaint are narrowly circumscribed, apparently to maximize the chances of class certification, and the complaint carefully avoids any allegation of adverse effect on Edwards personally. The complaint thus alleges that petitioners' conduct "injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)); *see also* App. 52a (Compl. ¶ 17) (violation "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market"). But, references to "cost," "prices," and "information," notwithstanding, Edwards has not alleged either a pecuniary injury or an "informational" injury that constitutes the requisite injury for purposes of Article III. Nor has she alleged any other concrete injury that is sufficient to establish standing to sue.

1. Edwards Alleged No Pecuniary Injury

Plaintiff has not alleged that the conduct at issue made her worse off economically in any way.

a. Plaintiff cannot allege that she was deprived of lower-cost title insurance available for purchase in Ohio. The complaint implies that, if some unspecified information that was not provided had been provided, plaintiff would have (or, at least, might have) paid less for title insurance. But that allegation is legally untenable – and therefore cannot be the basis for standing, even at the pleading stage – because the only title insurance available in Ohio at the time

of Edwards's closing was offered at the same price under the state regulatory scheme. *See supra* pp. 5-6. That conclusion was accepted by the courts below. *See* App. 4a ("Plaintiff does not and cannot make th[e] allegation [that she suffered an overcharge] because Ohio law mandates that all title insurers charge the same price."), 14a ("Edwards admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"). And, in opposing the petition for certiorari, though she disputed that "the absence of an 'overcharge'" is the same as "the absence of economic injury," Edwards did *not* claim that any overcharge occurred. Br. in Opp. 22; *see also* Sup. Ct. R. 15.2.

Edwards likewise does not allege that First American's actions caused her to receive less value for her money than she otherwise would have received. Hypothetically, some title insurers might provide better service than others; even without price competition, an insured might therefore be injured if denied that superior service. Edwards, however, does not allege that she suffered any such injury.

b. Edwards has argued that she suffered an economic injury based on the "systemic effects" of "reverse competition" on pricing, Br. in Opp. 22, but the complaint does not allege that the price that *she* paid actually was higher (or quality lower) because of the conduct challenged in this case.[13] What the insurance market would have looked like in Ohio had First American's relationship with Tower City been different is entirely speculative. *Cf. id.* at 6 n.3

---

[13] Edwards also does not allege that she is likely to pay more for title insurance in the future or to receive lower-quality services, which would be necessary for standing to seek injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

(arguing that, as a result of *industry concentration*, not preferential agency relationships, "the practical effect of the state rate-setting scheme is to allow the dominant insurers to set prices at monopoly levels"). A plaintiff who alleges only a "remote possibility, unsubstantiated by allegations of fact, that [her] situation might have been better had [the defendants] acted otherwise," has not established standing. *Warth*, 422 U.S. at 507; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality) (holding insufficient to establish standing "allegations of economic harm [that] rest on . . . hypothetical assumptions"); *Allen v. Wright*, 468 U.S. 737, 757 (1984) (declining to find standing based on an injury that was "highly indirect and 'result[ed] from the independent action[s] of some third part[ies] not before the court'") (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976)).

Nor does it help Edwards to compare her case to an antitrust claim involving "a market that has been monopolized or subject to illegal pricing agreements." Br. in Opp. 22. In such cases, to establish standing under Article III, a plaintiff must allege precisely what Edwards did not allege here – that, absent the unlawful conduct, the price plaintiff paid would have been lower (or quality higher) such that the plaintiff has suffered a concrete economic harm. *See, e.g.*, *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008) (affirming dismissal of antitrust claim for lack of Article III standing where plaintiff "failed to satisfy his burden to establish a genuine issue as to whether he suffered an injury-in-fact"). That is so even though no one would seriously dispute that unreasonable restraints of trade are unlawful because they tend to harm consumers. *Cf. Texaco Inc. v.*

Dagher, 547 U.S. 1, 5 (2006) (noting that "horizontal price-fixing agreements" are "*per se* unlawful" because they are among the class of agreements that are "plainly anticompetitive") (internal quotation marks omitted).

Here, Edwards did not allege any way in which the arrangement between First American and Tower City has led to higher prices. The bare assertion that Ohio's title insurance market would have been more favorable to plaintiff in 2006 had First American not invested in Tower City in 1998 is precisely the sort of "conjectural" injury that cannot give rise to standing under Article III; moreover, it fails to provide a plausible basis from which to infer the causation that Article III requires. *See Friends of the Earth*, 528 U.S. at 180 (injury must be "concrete and particularized," "not conjectural or hypothetical," and must be "fairly traceable to the challenged action of the defendant").

2. Edwards Alleged No "Informational" Injury

Edwards's claim that "all members of the proposed class" were denied "critical information" does not establish standing to sue under Article III because the mere fact that a plaintiff allegedly did not receive information, without more, is not a concrete injury. Rather, the "inability to obtain information," *FEC v. Akins*, 524 U.S. 11, 21 (1998), has been treated as a cognizable injury in fact only when the denial of information causes a distinct injury to some other legally protected interest.

For example, in *Akins*, the respondents – voters seeking information about a political committee – challenged the determination of the Federal Election Commission ("FEC") that AIPAC was not a "political committee" subject to statutory disclosure require-

ments. The Court noted that there was "no reason to doubt" that the information that would be made available if the FEC's determination were reversed "would help [the respondents] (and others to whom they would communicate it) to evaluate candidates for public office." *Id.* "Respondents' injury consequently seems concrete and particular." *Id.* Likewise, in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), the appellants sought access to the meetings and records of a private organization – the American Bar Association's Standing Committee on Federal Judiciary – "in order to monitor its workings and participate more effectively in the judicial selection process." *Id.* at 449. The individual who has sought information in such circumstances has suffered a "concrete and particular[ized]" harm, *Akins*, 524 U.S. at 21, but only because the individual sought and was denied specific information. *Cf.* Roberts, 42 Duke L.J. at 1228 n.60 (explaining that an "individual who has not made a disclosure request, and therefore has not suffered a wrongful denial [of government documents], has not been injured and does not have standing to sue").

Havens Realty dealt with a violation of § 804(d) of the Fair Housing Act, which made it unlawful to "represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available . . . when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1982). In that case, the petitioner falsely told a black "tester" – who did not intend to buy or rent a home – that no apartment was available. When a direct lie to one's face is the means by which one has been "personally denied equal treatment solely because of . . . membership in a disfavored group," it can inflict "serious nonecono[illegible]ic injur[y]." *Heckler v. Mathews*, 465 U.S.

728, 739-40 (1984). The injury inflicted in that situation is the sort of concrete and individualized, though non-pecuniary, injury that this Court has recognized can give rise to standing. *See Allen*, 468 U.S. at 755 (noting the "serious consequences" of the "stigmatizing injury often caused by racial discrimination").

Edwards has alleged nothing like those injuries here. Section 8(a) of RESPA – unlike the statutes at issue in *Akins* and *Public Citizen* – does not create any right to information; nor does it prohibit – as the Fair Housing Act does – the provision of incorrect information on the basis of race. Rather, a violation of § 8(a) depends on the transfer of a thing of value pursuant to an agreement to refer settlement-service business. Neither misrepresentation nor a failure to disclose is part of the statutory offense. One possible *defense* to a § 8(a) claim involves, in part, appropriate disclosure of an "affiliated business arrangement[]." 12 U.S.C. § 2607(c)(4).[14] But Edwards has not explained how unspecified information of which she was allegedly deprived affected, in any way, the impact on her of the settlement services transaction; to the contrary, Edwards has gone so far as to argue affirmatively to the district court that "disclosure is . . . irrelevant" to this case. JA115.[15]

---

[14] The fact that disclosure may be relevant to a defense does not transform the failure to disclose into an injury, any more than the existence of a valid defense would eliminate, for standing purposes, an actual injury that a plaintiff did allegedly suffer. *See, e.g., In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1004 (8th Cir. 2007) ("[t]he existence of a defense to a cause of action does not deprive the plaintiff of standing").

[15] In contrast to § 8(a), other parts of RESPA *do* create disclosure obligations. For example, § 4 requires a person conducting a settlement to provide a "standard form for the statement of settlement costs," 12 U.S.C. § 2603(a) – commonly known as a

Edwards also did not allege that she was denied information that she, personally, wanted for its own sake (assuming, for the sake of argument, that such a desire would be enough). Indeed, any claim that Edwards, herself, wanted information without regard to its practical value would be inconsistent with the claim that "all members of the proposed plaintiff class" were injured in the same way, App. 49a (Compl. ¶ 5); there would be no basis for attributing that idiosyncratic desire to absent class members.

3. Edwards Alleged No Other Injury Sufficient To Establish Standing To Sue

Edwards contends that the payment and acceptance of a referral fee is like the breach of a duty of loyalty owed by an agent to a principal, arguing that suits for breach of that duty may be maintained without further injury. *See* Br. in Opp. 21-22. The government compares the duty imposed by § 8(a) to a due process right to a conflict-free adjudicator. *See* U.S. Inv. Br. 12. Neither argument identifies an injury that satisfies Article III.

a. Edwards's complaint does not plead an injury based on a breach of special confidence and trust she had reposed in her settlement service provider. Even if she had, however, that would not, without more, satisfy Article III.

HUD-1. JA88-90. Similarly, § 5(c) requires a lender to furnish an advance "good faith estimate" of settlement costs, 12 U.S.C. § 2604(c), and § 5(d) obligates a lender to provide a preprinted booklet prepared by HUD, *id.* § 2604(d). These provisions carry out Congress's intent to require "more effective advance disclosure . . . of settlement costs," *id.* § 2601(b)(1), which was one purpose of RESPA. They could be characterized as giving rise to a right to receive information under the statute. Section 8, by contrast, does not create such a right.

First, § 8(a) prohibits the payment of certain referral fees; it does not establish an agency relationship or fiduciary duty running from settlement service providers to customers. This is particularly clear with respect to First American, which is not alleged to have had any contact with Edwards except through its agent, Tower City. Tower City, moreover, had no obligation under § 8(a) to give Edwards careful, disinterested advice about the purchase of title insurance; it was subject to a narrow prohibition on the acceptance of certain payments. Tower City's statutory obligation to Edwards thus bore no relationship to the "rule of undivided loyalty" that the common law has long recognized as "relentless and supreme." *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928) (Cardozo, J.).

More broadly, the argument that Tower City is the equivalent of Edwards's agent – simply because Tower City had a statutory duty that runs toward purchasers of settlement services – would render the standing requirement illusory in a broad range of cases. For example, a shareholder (or former shareholder) would not need to allege any loss due to a misstatement in a securities filing, just that she felt betrayed by the falsehood, *but cf. Gollust*, 501 U.S. at 126; the purchaser of a product from a company that had entered into an allegedly unlawful agreement would have standing based on the violation of the duty to sell products free of such "taint," *but cf. Gerlinger*, 526 F.3d at 1256. In substance, this argument is no different from the argument that the allegation of a statutory violation with respect to Edwards's transaction, without more, confers standing – a proposition that is incorrect. *See infra* Part II.B.

Second, even the allegation of a breach of an express fiduciary obligation does not, in any event, allow a plaintiff to sue in the absence of a distinct injury. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") creates express fiduciary obligations owed to plan beneficiaries, *see* 29 U.S.C. § 1104(a); renders "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" liable for "any losses to the plan," *id.* § 1109(a); and authorizes a "civil action . . . by a participant [or] beneficiary . . . for appropriate relief under section 1109," *id.* § 1132(a)(2). *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

Applying Article III in the context of these provisions, the courts of appeals have uniformly ruled that a beneficiary lacks standing to sue for a past breach of fiduciary duty in the absence of evidence of an actual financial injury to the plaintiff. *See, e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting the argument that "deprivation of [an] entitlement to [a] fiduciary duty . . . constitutes an injury-in-fact sufficient for constitutional standing"); *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 608-09 (6th Cir. 2007); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (allowing plan beneficiary to sue based on injury to plan would "fatally undermin[e] any limitation the requirement of concrete injury places on constitutional standing"); *cf. McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1084-85 (8th Cir. 2009) (holding, in light of Article III concerns, that participants who "'have suffered *no* injury in fact'"

may not "bring an action 'to enforce ERISA fiduciary duties'") (quoting *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002)); *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (holding that beneficiary could not maintain suit for restitution and disgorgement in the absence of "individual loss").[16] Those cases refute Edwards's suggestion that the alleged violation of a fiduciary duty is injury in itself.[17]

---

[16] *Horvath* also held that a plaintiff could sue to enjoin future breaches of the defendant health plan's obligation to disclose information relating to physician incentives without "demonstrat[ing] actual harm." 333 F.3d at 456. But that statement refers to *past* harm, not threatened future harm; the plaintiff in that case *did* allege that information that the defendant failed to disclose had "the potential to impact healthcare decisions made by its physicians and thus decrease the overall level of care provided." *Id.* at 453. To read the court's statement to indicate that the statutory breach had been an injury sufficient to confer standing would be inconsistent with the court's holding that the alleged violation did not constitute an injury in fact sufficient to allow the plaintiff's claim for restitution and disgorgement to proceed. *See also Loren*, 505 F.3d at 609-10.

[17] In her brief in opposition (at 22), Edwards cited *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996), along with the Restatement of Agency, but those authorities do not support the proposition that a suit for breach of a fiduciary duty can proceed in the absence of distinct harm. In *Hendry*, the D.C. Circuit made clear that "forfeiture [of attorney's fees charged by a faithless fiduciary] reflects . . . the decreased value of the representation itself," *id.* at 402 – that is, an actual injury in fact. The Restatement is to the same effect. *See* Restatement (Second) of Agency § 469 (1958) (agent is entitled to "no *compensation* for conduct which is disobedient or which is a breach of his duty of loyalty") (emphasis added); Restatement (Third) of Agency § 8.01 cmt. d(2) (2006) (same). Edwards did not allege an injury of this kind, because she did not claim that she paid First American or Tower City for advice about title insurance or that she did not get what she paid for.

b. The government argued at the certiorari stage that Edwards's interest in obtaining "conflict-free" advice is analogous to a procedural right to a conflict-free judge.[18] But that contention undermines, rather than supports, Edwards's claim that she has standing. "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers*, 129 S. Ct. at 1151; *see also id.* at 1153 (Kennedy, J., concurring). In a case about procedural rights, it is the "impairment" of the underlying "concrete interest[]" that satisfies the "requirement of injury in fact." *Id.* at 1151; *see also Lujan*, 504 U.S. at 573 n.8 (explaining that a plaintiff "assuredly" can "enforce procedural rights . . . so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," but not otherwise).

Accordingly, when the liberty of a defendant is at stake, a violation of a procedural right suffices to establish standing without any showing that the outcome would have been different *not* because a showing of injury is unnecessary – the injury is the conviction and the deprivation of liberty that entails – but because a "procedural right . . . can loosen the strictures of the *redressability* prong of our standing inquiry." *Summers*, 129 S. Ct. at 1151 (emphasis added). The injury-in-fact requirement cannot be "loosen[ed]" in this way.

---

[18] *See* U.S. Inv. Br. 12 (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and *Tumey v. Ohio*, 273 U.S. 510 (1927)).

B. Edwards Cannot Establish Standing Based Merely on the Allegation That First American Violated RESPA in Connection with Her Settlement Transaction

Edwards argued in opposition to certiorari that she suffered an invasion of her "right to conflict-free referral advice" and that the "invasion of that statutory right is an injury conferring standing." Br. in Opp. 21; *accord* U.S. Inv. Br. 11 (RESPA confers a "legal right to a real estate settlement untainted by kickbacks, improper referrals, and unearned fees"). That argument, however, is simply another way of asserting that First American's alleged conduct violates the statute; it does not identify any distinct, concrete impact on Edwards. And the bare allegation that one has been subjected to a statutory violation, without more, does not establish injury sufficient for Article III.

1. To avoid "draining th[e] requirements of [Article III] of meaning," this Court has declared certain types of interests categorically insufficient to support standing. *Valley Forge Christian College*, 454 U.S. at 483. One categorically insufficient interest is "the interest in seeing that the law is obeyed," *Akins*, 524 U.S. at 24, even when perceiving disobedience has the "psychological consequence presumably produced by observation of conduct with which one disagrees," *Valley Forge Community College*, 454 U.S. at 485; *see ASARCO* 490 U.S. at 616 (plurality); *Steel Co.*, 523 U.S. at 107 (explaining that an interest in seeing "that a wrongdoer gets his just deserts" or "that the Nation's laws are faithfully enforced" is "not . . . a cognizable Article III injury"). Equating such interests with cognizable injuries would effectively authorize "citizen suits to vindicate the public's non-

concrete interest in the proper administration of the laws," an outcome this Court has decisively rejected. *Massachusetts v. EPA*, 549 U.S. at 516-17 (internal quotation marks omitted).

Here, Edwards pleaded a sort of particularized connection to the alleged violation: she purchased title insurance from a specific First American agent, and most of the U.S. population did not. But, to establish standing, a plaintiff cannot rely on an injury "of an abstract and indefinite nature" – whether or not the injury is "widely shared." *Akins*, 524 U.S. at 23. It is true that Edwards bought title insurance, but that fact does not materially distinguish her from any bystander to the transaction unless the violation had an adverse effect on the purchase – which is precisely what Edwards did not and could not allege. *Cf. Doe v. Chao*, 540 U.S. 614, 624-25 (2004) (only a plaintiff "subjected to an adverse effect has injury enough to open the courthouse door"). Edwards alleged a connection to the challenged conduct that may have made her *potentially* vulnerable to an injury, but that, by itself, made her no more than a member of "a subclass of citizens who suffer no distinctive concrete harm." *Lujan*, 504 U.S. at 576-77. The mere purchase of title insurance that Edwards needed, at the state-approved rate, with no complaint about service, quality, coverage, or any other aspect of her policy, is not a cognizable injury.[19]

---

[19] There is no paradox in saying that a consumer who suffers an overcharge of $1 has suffered an injury – one that entitles her to pursue a cause of action that may authorize many hundreds of dollars in damages – while a consumer who suffers no injury cannot sue. *Cf. Sprint*, 554 U.S. at 289; *id.* at 315 (Roberts, C.J., dissenting). A statute authorizing recovery vastly in excess of any actual harm suffered by the plaintiff might

Congress may "broaden[] the categories of injury that may be alleged in support of standing," *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), that is, it may "'define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). It does so, however, not by declaring that experiencing a statutory violation constitutes *per se* injury, but by "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law," *Lujan*, 504 U.S. at 578; *see also Massachusetts v. EPA*, 549 U.S. at 516 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

Given Edwards's failure to allege any distinct adverse effect, her asserted right to settlement services free of the "taint" of prohibited kickbacks is "abstract, self-contained, [and] noninstrumental." *Lujan*, 504 U.S. at 573. Congress cannot legislate away Article III's requirement of *particular* and *concrete* injury by purporting to convey such a right. *See Summers*, 129 S. Ct. at 1151.[20] Any other under-

---

raise issues under the Due Process Clause. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (describing the due process analysis for punitive damages in which courts consider, among other things, the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"). But there would be no issue concerning the plaintiff's standing to sue.

[20] As one commentator explained this Court's decisions:

> Congress can "create" standing where none had existed before, if it identifies an injury (or chain of causation, or means of redress) that, while already sufficient to confer Article III standing, had not previously been legally action-

standing would undermine the fundamental principle that the courts exist "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 1148; *see also Vermont Agency*, 529 U.S. at 772-73 ("The interest must consist of obtaining *compensation for*, or *preventing*, the violation of a legally protected right.") (emphases added).

2. Not only does Congress lack the power to deem a legal violation a *per se* injury; RESPA is not properly read as attempting to do so. Notwithstanding the broad wording of § 8(d)(2), RESPA does not "'define [an] injur[y]'" or "'articulate [a] chain[] of causation'" that could give rise to a case or controversy in the absence of adverse economic impact on the plaintiff. *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). To the contrary, the statute indicates that the prohibition at issue protects consumers' *pecuniary* interests.

Congress enacted RESPA to protect "consumers throughout the Nation . . . from *unnecessarily high settlement charges* caused by certain abusive practices." 12 U.S.C. § 2601(a) (emphasis added). Congress intended "to effect certain changes in the settlement process for residential real estate" that would, among other things, "eliminat[e] . . . kickbacks or referral fees that *tend to increase unnecessarily the costs* of certain settlement services."

---

able. At the same time, however, Congress cannot redefine what injuries, chains of causation, or means of redress are sufficient to confer Article III standing: that is the Court's job.

Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 193 (2011).

Id. § 2601(b)(2) (emphasis added). That language does not suggest that a "tainted referral" is a concrete wrong in itself. Rather, the statute expressly speaks to the economic *effects* of such referrals – that is, the financial injury caused when a settlement service provider takes advantage of an unwitting customer unlawfully referred.[21]

---

[21] The Senate committee report explained that the provision that became § 8(a) "is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." S. Rep. No. 93-866, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. The report described some of the prohibited arrangements (none of which resembles the semi-exclusive agency arrangement alleged here) and concluded that, "[i]n *all* of these instances, the payment or thing of value furnished by the person to whom the settlement business is referred *tends to increase the cost of settlement services* without providing any benefits to the home buyer." *Id.* (emphases added). Likewise, in a floor statement introducing earlier legislation, Senator Brock explained that the provision that is now § 8(a) "would prohibit any kickback or referral fee that is paid or received for the mere referral of settlement business and would prohibit any fee-splitting among persons who render settlement services unless the fee is paid in return for services actually rendered. These kickbacks or referral fees *increase the cost of settlement services to the home buyer* without providing any benefits to him." 120 Cong. Rec. 6586 (Mar. 13, 1974) (emphasis added).

The government has relied on a committee report accompanying the 1983 amendments to RESPA. *See* U.S. Inv. Br. 12. But that legislation did not amend § 8(a), which has remained unchanged since its enactment in 1974. A 1982 committee report sheds no light on Congress's intent in passing § 8(a). *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). In any event, that report referred to arrangements under which a consumer "is likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." H.R. Rep. No. 97-

First American does not now argue that Edwards has failed to establish statutory standing under the "'zone-of-interests' test." *Bennett v. Spear*, 520 U.S. 154, 161 (1997). That would be an argument that, even if Edwards had alleged a *de facto* injury, the statute does not render that injury cognizable. The point here is, rather, that the absence from RESPA of any indication that the bare invasion of a right to "conflict-free" settlement services constitutes an injury in itself reinforces the conclusion that an alleged statutory violation, in the absence of adverse effects, is not an actual injury and cannot support standing under Article III.

III. ENFORCEMENT OF ARTICLE III'S STANDING REQUIREMENT SERVES INTERESTS THAT ARE CRITICAL TO THE ADMINISTRATION OF JUSTICE AND SEPARATION OF POWERS

This Court has "always insisted on strict compliance with th[e] jurisdictional standing requirement." *Raines*, 521 U.S. at 819. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

In evaluating Edwards's claim of injury, it pays to keep in mind *why* Edwards's complaint looks the way it does and to consider, in particular, why Edwards's experienced class counsel might have chosen to emphasize that First American's conduct had

---

532, at 51 (1982). Edwards does not allege that she (much less "all members of the proposed plaintiff class") suffered any of those concrete injuries.

"injured all members of the proposed plaintiff class in precisely the same way." App. 49a (Compl. ¶ 5). One likely reason is that an individual plaintiff with a truly personal and concrete injury – one, for example, who had bought title insurance in a jurisdiction where underwriters charged different rates for title insurance, and who therefore could plausibly allege an overcharge – would have been much less adequate as a putative class representative. Such a plaintiff would have been unable to argue, as Edwards did, that her "claim [was] . . . not only *typical* of the Class claims in this case, [but] *identical*" to all the others. JA138 (second emphasis added). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law.") (citation and internal quotation marks omitted); *cf. ASARCO*, 490 U.S. at 615 (plurality) ("the doctrine of standing to sue is not a kind of gaming device").

By sponsoring a theory of injury that requires no more than an alleged statutory violation, without any need for consideration of the effect (if any) of that violation on individual class members, Edwards has so far been able to maintain herself as a plausible representative for a vast class. Section 8(d)(2) of RESPA authorizes recovery of "three times the amount of any charge paid for . . . settlement service." 12 U.S.C. § 2607(d)(2). A defendant in such a case might face potentially enormous damages. That prospect allows a class representative to take advantage of the *in terrorem* effect to pursue a settlement without even alleging that the defendant's conduct actually made *anyone*, including her, worse off.

Given the consequences of a judgment – even if its probability is low – allowing such suits to proceed undermines, rather than serves, the interests of ensuring the just resolution of real disputes. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). We do not question that the damages class action serves a legitimate function when it enables recovery on behalf of a broad class whose members have each suffered an actual but small injury. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). When it is used, however, to multiply by many thousands the kind of recovery – unmoored to a concrete injury – that this Court has compared to a "wager upon the outcome" of a lawsuit, *Vermont Agency*, 529 U.S. at 772, it is not within the traditional and legitimate role of the courts.

A finding that Article III jurisdiction is lacking here would by no means undermine enforcement of § 8(a). RESPA itself not only is a criminal statute, but also has civil enforcement provisions that permit either federal or state regulators to seek broad injunctive relief to prevent violations and protect consumers. *See* 12 U.S.C. § 2607(d).[22] In addition, it explicitly preserves from preemption state laws that govern affiliated business arrangements, and many states – including Ohio – regulate extensively the

---

[22] HUD actively enforces RESPA, including § 8(a), as do state insurance officials. *See, e.g.*, Press Release, *HUD Settles Allegations that Prospect Mortgage Violated RESPA and FHA Reporting Requirements*, HUD No. 11-146 (July 13, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-146.

business of title insurance and the role of title insurance agents. *See, e.g.*, Ohio Rev. Code §§ 3953.25, 3953.26 (restricting commissions payable for title insurance to licensed title insurance agents and prohibiting the payment of other inducements to obtain title insurance business); Palomar, *Title Insurance Law* ch. 18. Although First American is confident that it violated neither RESPA nor state law through the transactions that Edwards has alleged, this Court need not be concerned that there is any shortage of enforcement authority available if federal or state regulators think otherwise.

Furthermore, allowing a plaintiff to pursue a statutory cause of action in the absence of an actual injury would expand judicial and legislative power at the expense of the executive. Unlike a private litigant, the executive does not need to establish standing to pursue a legal violation: criminal and civil enforcement is brought by the executive in the *public* interest, and the executive exercises considerable discretion – usually, though not always, unreviewable, *see Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) – with respect to which violations or potential violations warrant the commitment of executive resources to pursue. Unlike private litigants and unelected judges, political actors in the executive branch remain accountable through the democratic process for decisions to enforce (or not to enforce) statutes in the public interest.[23]

The limits on the judicial power are not simply a constitutional nicety; they significantly affect those who are subject to suit. It should never be forgotten

---

[23] *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

that the "exercise of judicial power . . . can . . . profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College*, 454 U.S. at 473. A person who has suffered a legal wrong deserves a forum to vindicate her interest and obtain compensation, and a wrongdoer is fairly held accountable for the harm his wrong inflicts on others. But it is no part of the judicial role to inflict a punishment, and to award a windfall, at the behest of a claimant who has suffered no harm.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

August 22, 2011

ADDENDUM

TABLE OF CONTENTS

Page

Statutory Provisions Involved 1a

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*:

§ 2, 12 U.S.C. § 2601 ..... 1a

§ 3, 12 U.S.C. § 2602 ..... 2a

§ 4, 12 U.S.C. § 2603 ..... 5a

§ 5, 12 U.S.C. § 2604 ..... 6a

§ 6, 12 U.S.C. § 2605 ..... 9a

§ 8, 12 U.S.C. § 2607 ..... 20a

§ 12, 12 U.S.C. § 2610 ..... 24a

§ 16, 12 U.S.C. § 2614 ..... 24a

STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601, provides:

§ 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

2. Section 3 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2602, provides:

§ 2602. Definitions

For purposes of this chapter –

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which –

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corpora-

tion, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "Settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

3. Section 4 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2603, provides:

§ 2603. Uniform settlement statement

(a) The Secretary, in consultation with the Administrator of Veteran's Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the

borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.

4. Section 5 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2604, provides:

§ 2604. Special information booklets

(a) Distribution by Secretary to lenders to help borrowers

The Secretary shall prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services. The Secretary shall distribute such booklets to all lenders which make federally related mortgage loans.

(b) Form and detail; cost elements, standard settlement form, escrow accounts, selection of persons for settlement services; consideration of differences in settlement procedures

Each booklet shall be in such form and detail as the Secretary shall prescribe and, in addition to such other information as the Secretary may provide, shall include in clear and concise language –

(1) a description and explanation of the nature and purpose of each cost incident to a real estate settlement;

(2) an explanation and sample of the standard real estate settlement form developed and prescribed under section 2603 of this title;

(3) a description and explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate;

(4) an explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incident to a real estate settlement; and

(5) an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

Such booklets shall take into consideration differences in real estate settlement procedures which may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

(c) Estimate of charges

Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

(d) Distribution by lenders to loan applicants at time of receipt or preparation of applications

Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

(e) Printing and distribution by lenders of booklets approved by Secretary

Booklets may be printed and distributed by lenders if their form and content are approved by the Secretary as meeting the requirements of subsection (b) of this section.

5. Section 6 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2605, provides:

§ 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or

transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor

servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property

for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that –

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) to the extent applicable, a statement of the reasons for which the servicer believes the

account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of –

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of –

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of –

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding

timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include –

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

6. Section 8 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607, provides:

§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law

for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone,[1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any

---

[1] So in original. The comma probably should not appear.

required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate

title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

7. Section 12 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2610, provides:

§ 2610. Prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements

No fee shall be imposed or charge made upon any other person (as a part of settlement costs or otherwise) by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a mobile home), or by a servicer (as the term is defined under section 2605(i) of this title), for or on account of the preparation and submission by such lender or servicer of the statement or statements required (in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C. 1601 § et seq.].

8. Section 16 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2614, provides:

§ 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is

alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 10-708

OCT 1 !

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

JEFFREY A. LAMKEN
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

RICHARD S. GORDON
MARTIN E. WOLF
GORDON & WOLF CHTD
102 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 825-2900

JAMES W. SPERTUS
LAW OFFICES OF JAMES W. SPERTUS
12100 Wilshire Blvd., Suite 620
Los Angeles, California 90025
(310) 826-4700

CYRIL V. SMITH
Counsel of Record
CONOR B. O'CROININ
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 332-0444
csmith@zuckerman.com

DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

EDWARD KRAMER
FAIR HOUSING LAW CLINIC
CLEVELAND-MARSHALL COLLEGE OF LAW
3214 Prospect Avenue
Cleveland, Ohio 44115
(216) 431-7400

Counsel for Respondent Denise P. Edwards

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

Congress enacted Section 8 of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §2607, to protect homebuyers from the conflicts of interest that arise when a real estate professional accepts kickbacks for referrals—conflicts that tend to increase the cost and decrease the quality of settlement services. Congress prohibited the payment or receipt of kickbacks, *id.* §2607(a), and authorized consumers to recover three times the settlement charge if they receive services in violation of that prohibition, *id.* §2607(d)(2). The question presented is:

Whether Section 8 of RESPA is a permissible exercise of Congress's authority to enact "statutes creating legal rights, the invasion of which creates standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted).

TABLE OF CONTENTS

	Page
Question Presented	i
Introduction	1
Statutory Provisions Involved	2
Statement	2
I. Statutory Framework	2
A. The Real Estate Settlement Procedures Act	2
B. The 1983 Amendments	5
C. The Title Insurance Industry	9
II. Proceedings Below	11
A. Background	11
B. Proceedings in the District Court	13
C. The Court of Appeals' Decision	14
Summary of Argument	15
Argument	17
I. RESPA Validly Extends Legal Protection to Interests Long Recognized To Be Protectable	19
A. Framing-Era Courts Routinely Allowed Suits over Conflicted Transactions with No Further Inquiry into Economic Harm	21
1. English Law	21
2. American Law	23
B. The No-Further-Inquiry Rule Applies to Kickbacks	25
C. RESPA Follows the Traditional No-Further-Inquiry Rule	27

TABLE OF CONTENTS—Continued

Page

1. RESPA Invokes the No-Further-Inquiry Rule To Protect Home-buyers from Kickbacks 27
2. The Rationales for the No-Further-Inquiry Rule Apply Here 28

D. Petitioners' Attempts To Avoid the No-Further-Inquiry Rule Fail 31

1. Congress Properly Applied the No-Further-Inquiry Rule to All Participants in the Breach of a Targeted Duty To Avoid Particularly Egregious Conflicts 31
2. RESPA Does Not Protect a Procedural Right *in Vacuo* 33
3. Petitioners' ERISA Cases Do Not Cast Doubt on 250 Years of Precedent 35

E. Economic Harm Was Likely Here, But Nonetheless Irrelevant Under the No-Further-Inquiry Rule 35

II. RESPA Is a Valid Exercise of Congress's Authority To Define Injuries 38

A. RESPA Creates Legal Rights, the Invasion of Which Constitutes an Injury 38

1. Congress Can Define New Injuries 38
2. The Injury Congress Defined in RESPA Is Consistent with Article III 40
3. RESPA Does Not Merely Create a Right to Lower Prices 42

TABLE OF CONTENTS—Continued

	Page
B. The Law Has Long Recognized Invasion of a Legal Right Itself To Be an Injury	44
1. Nominal Damages	44
2. Statutory Damages	46
C. RESPA Represents a Modest Exercise of Congress's Authority	47
1. Presumed Damages	47
2. Unjust Enrichment	49
3. Payment of Money	51
D. The Court Should Not Rewrite Article III To Address Purported Class Action Abuses	52
Conclusion	54
Statutory Appendix:	
Appendix A – Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§2601-2617	1a
Appendix B – Section 8 of the Real Estate Settlement Procedures Act of 1974, as enacted, Pub. L. No. 93-533, 88 Stat. 1724, 1727	31a
Appendix C – Ohio Revised Code §§3935.01-.10	33a

TABLE OF AUTHORITIES

Page

CASES

Aberdeen Ry. Co. v. *Blaikie Bros.*, 1 Macq. 461, [1843-60] All E.R. Rep. 249 (H.L. 1854) 23, 36

Alston v. *Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) 15, 37

Alvarez v. *Longboy*, 697 F.2d 1333 (9th Cir. 1983) 40

Am. Needle, Inc. v. *NFL*, 130 S. Ct. 2201 (2010) 37

Amnesty Int'l USA v. *Clapper*, 638 F.3d 118 (2d Cir. 2011) 51

Ashby v. *White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703) 44, 45

Beaudry v. *TeleCheck Servs., Inc.*, 579 F.3d 702 (6th Cir. 2009) 40, 47

Blessing v. *Freestone*, 520 U.S. 329 (1997) 41

BMW of N. Am., Inc. v. *Gore*, 517 U.S. 559 (1996) 30

Boyd v. *Hawkins*, 2 Dev. Eq. 195 (N.C. 1832) 23

Brackenridge v. *Holland*, 2 Blackf. 377 (Ind. 1830) 23

Butler v. *Haskell*, 4 Des. Eq. 651 (S.C. Ch. 1817) 23

Campbell v. *Pa. Life Ins. Co.*, 2 Whart. 53 (Pa. 1837) 23

Campbell v. *Walker*, 5 Ves. Jun. 678, 31 Eng. Rep. 801 (Ch. 1800) 22, 29

Carey v. *Piphus*, 435 U.S. 247 (1978) 46

TABLE OF AUTHORITIES—Continued

	Page
Carter v. *Harris*, 4 Rand. 199 (Va. 1826)	23
Carter v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009)	15
Coleman v. *Miller*, 307 U.S. 433 (1939)	19
Coles v. *Trecothick*, 9 Ves. Jun. 234, 32 Eng. Rep. 592 (Ch. 1804)	22
Cooper v. *Paris*, 413 So. 2d 772 (Fla. Dist. Ct. App. 1982)	52
Creagh v. *Savage*, 9 Ala. 959 (1846)	23
Crowe v. *Ballard*, 3 Bro. C.C. 117, 29 Eng. Rep. 443 (Ch. 1790)	22
Currier v. *Green*, 2 N.H. 225 (Super. Ct. 1820)	23
Davison v. *Gardner* (Ch. 1743), ms. rep. in W. Cruise, *A Digest of the Laws of England Respecting Real Property* 551-552 (1804)	21
Davoue v. *Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816)	23, 29, 30
Doe v. *Chao*, 540 U.S. 614 (2004)	40
Douglas v. *Cunningham*, 294 U.S. 207 (1935)	49
Dryden v. *Lou Budke's Arrow Fin. Co.*, 630 F.2d 641 (8th Cir. 1980)	40
Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974)	53
Ex parte Bennett, 10 Ves. Jun. 382, 32 Eng. Rep. 893 (Ch. 1805)	22, 28
Ex parte James, 8 Ves. Jun. 338, 32 Eng. Rep. 385 (Ch. 1803)	22, 28

TABLE OF AUTHORITIES—Continued

Page

Ex parte Lacey, 6 Ves. Jun. 626, 31 Eng. Rep. 1228 (Ch. 1802) 22

Ex parte Reynolds, 5 Ves. Jun. 707, 31 Eng. Rep. 816 (Ch. 1800) 22

Ex parte Wiggins, 1 Hill Eq. 353 (S.C. Ch. 1833) 23

FEC v. *Akins*, 524 U.S. 11 (1998) 39, 42

Feltner v. *Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) 47

Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 31

FTC v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992) 37

Gen. Motors Corp. v. *Devex Corp.*, 461 U.S. 648 (1983) 50

Harrod v. *Norris' Heirs*, 11 Mart. (o.s.) 297 (La. 1822) 23

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) ..... *passim*

Hittson v. *Browne*, 3 Colo. 304 (1877) 52

Horvath v. *Keystone Health Plan E., Inc.*, 333 F.3d 450 (3d Cir. 2003) 35

Keech v. *Sandford*, Sel. Cas. t. King 61, 25 Eng. Rep. 223 (Ch. 1726) 21, 29

Kendall v. *Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009) 35

Kowalski v. *Cedars of Portsmouth Condo. Ass'n*, 769 A.2d 344 (N.H. 2001) 52

TABLE OF AUTHORITIES—Continued

Page

Leigh v. *Engle*, 727 F.2d 113 (7th Cir. 1984) 35

Lessee of Lazarus v. *Bryson*, 3 Binn. 54 (Pa. 1810) 23

Lister v. *Lister*, 6 Ves. Jun. 631, 31 Eng. Rep. 1231 (Ch. 1802) 22

Loren v. *Blue Cross & Blue Shield of Mich.*, 505 F.3d 598 (6th Cir. 2007) 35

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

Magruder v. *Drury*, 235 U.S. 106 (1914) 24, 28

Marbury v. *Madison*, 5 U.S. 137 (1803) 45

Marzullo v. *Molineaux*, 651 A.2d 808 (D.C. 1994) 52

Mascarenas v. *Jaramillo*, 806 P.2d 59 (N.M. 1991) 51

Massachusetts v. *EPA*, 549 U.S. 497 (2007) ..... *passim*

Memphis Cmty. Sch. Dist. v. *Stachura*, 477 U.S. 299 (1986) 48, 49

Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 26

Michoud v. *Girod*, 45 U.S. 503 (1846) 20, 24, 29

Mills v. *Goodsell*, 5 Conn. 475 (1825) 23

Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. *City of Jacksonville*, 508 U.S. 656 (1993) 34

Orr v. *Churchill*, 1 H. Bl. 227, 126 Eng. Rep. 131 (C.P. 1789) 48

Pollard v. *Lyon*, 91 U.S. 225 (1876) 48

TABLE OF AUTHORITIES—Continued

Page

Pure Power Boot Camp, Inc. v. *Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417 (S.D.N.Y. 2010) 40

Randall v. *Errington*, 10 Ves. Jun. 424, 32 Eng. Rep. 909 (Ch. 1805) 22

Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 37

Remsen Partners, Ltd. v. *Stephen A. Goldberg Co.*, 755 A.2d 412 (D.C. 2000) 52

Robey v. *Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208 (10th Cir. 2006) 40

Rodolitz Org. v. *Secondary Mortg. Res., Inc.*, 572 N.Y.S.2d 729 (App. Div. 1991) 52

Rogers v. *Rogers*, 3 Wend. 503 (N.Y. 1829) 23

Rubin v. *Douglas*, 59 A.2d 690 (D.C. 1948) 52

Ryden v. *Jones*, 1 Hawks 497 (N.C. 1821) 23

Saad v. *Rodriguez*, 506 N.E.2d 1230 (Ohio App. 1986) 9

SEC v. *Cavanagh*, 445 F.3d 105 (2d Cir. 2006) 49

Simon v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) 52

Sprint Commc'ns Co. v. *APCC Servs., Inc.*, 554 U.S. 269 (2008) 19

Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) 37

Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009) 18, 33, 34

Taylor v. *Henniker*, 12 Ad. & E. 489, 113 Eng. Rep. 897 (Q.B. 1840) 45

TABLE OF AUTHORITIES—Continued

	Page
Thorp v. *McCullum*, 1 Gilm. 614 (Ill. 1844)	23
United States v. *Bethlehem Steel Co.*, 205 U.S. 105 (1907)	49
United States v. *Carter*, 217 U.S. 286 (1910)	26
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006)	43
Varity Corp. v. *Howe*, 516 U.S. 489 (1996)	35
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000)	19, 20, 34, 46
Wade v. *Pettibone*, 11 Ohio 57 (1841)	23
Walton v. *Torrey*, Harr. 259 (Mich. Ch. 1841)	23
Warth v. *Seldin*, 422 U.S. 490 (1975)	15, 18, 39
Webb v. *Portland Mfg. Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838)	45
Weil v. *Neary*, 278 U.S. 160 (1929)	52
Whelpdale v. *Cookson*, 1 Ves. Sen. 9, 27 Eng. Rep. 856 (Ch. 1747)	21
Whichcote v. *Lawrence*, 3 Ves. Jun. 740, 30 Eng. Rep. 1248 (Ch. 1798)	29
White v. *Trotter*, 14 S. & M. 30 (Miss. 1850)	23
Whittemore v. *Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813)	45
Wilcox v. *Plummer's Executors*, 29 U.S. 172 (1830)	45
Woods v. *City Nat'l Bank & Trust Co. of Chi.*, 312 U.S. 262 (1941)	24

TABLE OF AUTHORITIES—Continued

Page

Wormley v. *Wormley*, 21 U.S. 421 (1823) 24

Wynns v. *Adams*, 426 B.R. 457 (E.D.N.Y. 2010), aff'd, No. 10-2138, 2011 WL 2519550 (2d Cir. Jun. 27, 2011) 51

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 2 17

11 U.S.C. § 110(e)(2) 51

11 U.S.C. § 110(i)(1)(B) 51

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601-2617) ..... *passim*

12 U.S.C. § 2601(b)(2) 4, 41, 43

12 U.S.C. § 2602(3) 2

12 U.S.C. § 2605(f) 54

12 U.S.C. § 2607(a) 4, 27, 28, 41, 43

12 U.S.C. § 2607(c)(4) 8

12 U.S.C. § 2607(c)(4)(A) 14

12 U.S.C. § 2607(c)(4)(C) 14

12 U.S.C. § 2607(d)(2) ..... *passim*

12 U.S.C. § 2614 5

Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974) 5, 30

Pub. L. No. 98-181, § 461(a)-(b), 97 Stat. 1153, 1230 (1983) (codified as amended at 12 U.S.C. §§ 2602(7), 2607(c)(4)) 8

TABLE OF AUTHORITIES—Continued

Page

Expedited Funds Availability Act, 12 U.S.C. § 4010(a) 39

Homeowners Protection Act of 1998, 12 U.S.C. § 4907(a) 39

Investment Company Act of 1940, 15 U.S.C. § 80a-35(b) 31

15 U.S.C. § 1117(a) 50

Anticounterfeiting Consumer Protection Act of 1996, 15 U.S.C. § 1117(c) 39

Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) 40

Truth in Lending Act:
15 U.S.C. § 1640(a) 40
15 U.S.C. § 1640(a)(2)(A) 51

Fair Credit Reporting Act, 15 U.S.C. § 1681n(a) 40, 47

Equal Credit Opportunity Act, 15 U.S.C. § 1691e 40

Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a) 40

Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a) 40

17 U.S.C. § 504(a) 47

17 U.S.C. § 504(b) 47, 50

17 U.S.C. § 504(c) 47

Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2707(c) 40

Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(c) 40

TABLE OF AUTHORITIES—Continued

	Page
Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2724(b)	40
28 U.S.C. § 2072(b)	53
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(c)(1)	40
Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a)	40
Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)	40
Cable Communications Policy Act of 1984:	
47 U.S.C. § 551(f)(2)	40
47 U.S.C. § 605(e)(3)	40
Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124	46
Fed. R. Civ. P. 23(f)	14, 43
Cal. Bus. & Prof. Code § 7031(b)	52
Fla. Stat. § 627.783	10
N.M. Stat. § 59A-30-6(E)	10
N.Y. Real Prop. Law § 442-e(3)	52
Ohio Rev. Code § 3935.01	10, 36
Ohio Rev. Code § 3935.03(B)	10
Ohio Rev. Code § 3935.04(A)	10, 37
Ohio Rev. Code § 3935.04(B)	10, 37
Ohio Rev. Code § 3935.04(D)	10
Ohio Rev. Code § 3935.07	10, 37
Utah Code § 61-2f-405(4)	52

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 93-1526 (1974) 5

H.R. Rep. No. 93-1177 (1974) 4

H.R. Rep. No. 97-532 (1982) 7, 8, 27

H.R. Rep. No. 98-123 (1983) 8

S. Rep. No. 93-866 (1974) 4

120 Cong. Rec. 23,551 (July 16, 1974) 4

Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs, 92d Cong. (Mar. 1-3, 1972) 2, 3, 4

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency, 92d Cong. (Feb. 22-24, 1972) ..... *passim*

Real Estate Settlement Costs: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency, 93d Cong. (Dec. 4-5, 1973 & Jan. 29-30, 1974) 2, 3

Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs, Ser. No. 97-24 (Sept. 15-16, 1981) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Title Insurance: Cost and Competition: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services, Ser. No. 109-88 (Apr. 26, 2006) 9, 29

TREATISES

Am. Jur. 2d *Damages* (2003) 49

W. Blackstone, *Commentaries on the Laws of England* (1768) 45, 48

G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (2d rev. ed. 1993) 24, 25, 26

C.J.S. *Licenses* (2005) 52

J. Chitty, *A Practical Treatise on the Law of Contracts* (2d ed. 1834) 46

S. Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* (1807) 48, 51

D. Dobbs, *Law of Remedies* (2d ed. 1993) 49, 50

T. Fessenden, *An Essay on the Law of Patents* (2d ed. 1822) 46

J. Kent, *Commentaries on American Law* (3d ed. 1836) 24

G. Palmer, *The Law of Restitution* (1978) 50

T. Parsons, *The Law of Contracts* (1855) 46

R. Pound, *Jurisprudence* (1959) 50

Restatement (First) of Contracts (1932) 48

Restatement (First) of Restitution (1937) 26, 50

Restatement (First) of Torts (1938) 48

TABLE OF AUTHORITIES—Continued

Page

Restatement (Second) of Agency (1958).... 21, 26, 30

Restatement (Second) of Contracts (1981)..... 46

Restatement (Second) of Torts (1979)..... 46, 50

Restatement (Second) of Trusts (1959) 21, 25

Restatement (Third) of Agency (2006) 25

Restatement (Third) of Restitution & Unjust Enrichment (2011) 49

Restatement (Third) of Trusts (2007)..... 24

Restatement (Third) of Trusts: Prudent Investor Rule (1992) 24

A. Scott, *The Law of Trusts* (1939)..... 26

A. Scott & W. Fratcher, *The Law of Trusts* (4th ed. 1987)..... 25

A. Scott *et al.*, *Scott and Ascher on Trusts* (5th ed. 2007)..... 24, 33

W. Seavey, *Handbook of the Law of Agency* (1964)..... 25

T. Sedgwick, *A Treatise on the Measure of Damages* (1847)..... 46, 47, 48

J. Story, *Commentaries on Equity Jurisprudence* (1836) 23, 24

J. Story, *Commentaries on the Law of Agency* (1839) 24

E. Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* (1805)..... 22

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

Am. Land Title Ass'n, *The Controlled Business Problem in the Title Insurance Industry* (Nov. 1979)..... 6, 27, 29, 36

B. Birnbaum, *An Analysis of Competition in the California Title Insurance and Escrow Industry* (Dec. 2005)..... 29

Copyright Enactments of the United States, 1783-1906 (Solberg 2d rev. ed. 1906)..... 46

Dep't of Hous. & Urban Dev. & Veterans' Admin., *Mortgage Settlement Costs* (Mar. 1972) 3, 9, 10

The Digest of Justinian (Watson trans., 1985)..... 30

A. Hofflander & D. Shulman, *The Distribution of Title Insurance*, 44 J. Risk & Ins. 435 (1977) 29, 36

D. Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277 (1989) 49

NAIC Title Insurance Task Force, *Survey of State Laws Regarding Title Data and Title Matters* (Mar. 22, 2010) 10

Peat, Marwick, Mitchell & Co., *Real Estate Closing Costs: RESPA, Section 14a* (Oct. 1980) 8

Peat, Marwick, Mitchell & Co., *Research on Real Estate Settlement Practices and Costs: Baseline Study of Title Insurance Industry* (Feb. 1980)..... 8, 10, 30

TABLE OF AUTHORITIES—Continued

Page

G. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521 (1997) 53

The Records of the Federal Convention of 1787 (Farrand ed., 1911) 17

A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 18

U.S. Dep't of Justice, *The Pricing and Marketing of Insurance* (Jan. 1977) 5, 6, 27, 36, 37

U.S. Gov't Accountability Office, *Title Insurance: Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers* (Apr. 2007) 9, 10, 29, 30

IN THE

Supreme Court of the United States

NO. 10-708

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

INTRODUCTION

Congress enacted Section 8 of the Real Estate Settlement Procedures Act ("RESPA") to protect homebuyers from specified conflicts of interest that tend to increase the cost and decrease the quality of settlement services. The right Congress recognized—to receive services free from kickbacks—has long been deemed legally protectable. RESPA thus falls comfortably within Congress's authority to establish legal rights, the invasion of which supports standing. Ms. Edwards suffered an invasion of that right and has standing to sue, regardless of any impact on the price or quality of the services.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Real Estate Settlement Procedures Act of 1974, as enacted, Pub. L. No. 93-533, 88 Stat. 1724, and as amended, 12 U.S.C. §§2601-2617, and Ohio Revised Code §§3935.01-.10 are set forth in the Appendix. App., *infra*, 1a-46a.

STATEMENT

I. STATUTORY FRAMEWORK

Homebuyers and sellers ordinarily must purchase various settlement services, such as title insurance, appraisals, and inspections. See 12 U.S.C. §2602(3). They generally trust real estate professionals to decide who will provide those services. It became common for service providers to compete, not by offering consumers lower prices or better quality, but by paying kickbacks to professionals in exchange for referrals. The professionals, in turn, would pursue their own interests rather than their customers' by referring business to providers that paid kickbacks. Congress enacted Section 8 of RESPA to protect consumers from those abuses.

A. The Real Estate Settlement Procedures Act

1. Congress enacted RESPA in 1974 after years of hearings and study,[1] including an influential report by the Department of Housing and Urban Development and

---

[1] See *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 92d Cong. (Feb. 22-24, 1972) ("*1972 House Hearings*"); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong. (Mar. 1-3, 1972) ("*1972 Senate Hearings*"); *Real Estate Settlement Costs: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 93d Cong. (Dec. 4-5, 1973 & Jan. 29-30, 1974) ("*1973 House Hearings*").

the Veterans' Administration, *Mortgage Settlement Costs* (Mar. 1972) ("*HUD-VA Report*"), reprinted in *1972 House Hearings* 735-1324. That report emphasized that a homebuyer "seldom decides who will provide settlement services for him." *Id.* at 2. "If there is a choice, he usually depends upon advice of the broker, escrow agent, seller, or settlement attorney." *Id.* at 2-3. That consumer reliance produced a phenomenon now known as "reverse competition"—an "elaborate system of referral fees, kickbacks, rebates, commissions and the like" offered "as inducements to those firms and individuals who direct the placement of business." *Id.* at 3. "These practices are widely employed, rarely inure to the benefit of the home buyer, and generally increase total settlement costs." *Ibid.*

HUD's Secretary testified that service providers pay kickbacks rather than "cutting costs to the home buyer" because a buyer "will ordinarily accept the services—and prices—of whomever he is referred to." *1972 House Hearings* 21-22; see *1972 Senate Hearings* 14. Congress heard complaints that, "[a]lthough the home buyer pays the bill, his interests often come last"; the "pervasiveness of kickback-type arrangements by [real estate] lawyers" was attributed to the "[c]onflict-of-interest * * * inherent in the work." *1972 House Hearings* 3, 8; see also *id.* at 621-622, 701; *1973 House Hearings* 52-53. The result was higher prices and lower quality—costs were inflated by "millions of dollars each year" in Washington, D.C., alone. *1972 House Hearings* 1-3.

Industry representatives concurred. The American Land Title Association ("ALTA") "agree[d] with the HUD study that kickbacks or rebates by title insurance companies increase closing costs" and acknowledged that, "[i]f kickbacks were prohibited, [that would] bring

down the costs." *1972 Senate Hearings* 73-74; see also *1972 House Hearings* 332, 339. A Senate report concluded that kickbacks were widespread and "tend[ed] to increase the cost of settlement services without providing any benefits to the home buyer." S. Rep. No. 93-866, at 6 (1974); see also H.R. Rep. No. 93-1177, at 7 (1974); 120 Cong. Rec. 23,551 (July 16, 1974) (Sen. Brock).

2. Congress enacted RESPA to combat those and other abuses. It considered price controls, but opted instead to "deal with th[e] problems and abuses directly" by banning kickbacks. S. Rep. No. 93-866, at 3-5. Congress sought to "eliminat[e] * * * kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. §2601(b)(2).

Section 8(a) imposes a duty on real estate professionals and settlement service providers to refrain from paying or receiving kickbacks for referrals in transactions involving "federally related" mortgage financing:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. §2607(a).

Section 8(d)(2) granted consumers a corresponding right to recover for violations, authorizing disgorgement of three times the kickback:

> [A]ny person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value * * * .

Pub. L. No. 93-533, §8(d)(2), 88 Stat. 1724, 1728 (1974). Congress explicitly authorized suit in federal court, 12 U.S.C. §2614, rejecting a proposal to limit jurisdiction to state courts, H.R. Conf. Rep. No. 93-1526, at 14 (1974).

B. The 1983 Amendments

After further study and hearings revealed widespread circumvention,[2] Congress amended RESPA to clarify its scope and strengthen enforcement.

1. The new hearings featured a report by the Department of Justice's Antitrust Division, *The Pricing and Marketing of Insurance* (Jan. 1977) ("*DOJ Report*"), reprinted in part in *1981 House Hearings* 212-283. "While [RESPA] [wa]s designed to close the front door to rebates and kickbacks," the report observed, "a loophole has appeared which may ultimately cause a problem worse than outright kickbacks." *Id.* at 269. That "loophole" was referral arrangements between affiliates. *Ibid.* A real estate agent, for example, could purchase a title agent, direct business to it, and "[i]nstead of receiving a kickback * * * receive corporate dividends." *Id.* at 271.

The Justice Department found that those "controlled business arrangements" create the same conflicts of interest as traditional kickbacks. A professional's "knowledge, experience, and business relationships" allow him to "control * * * the placement" of services. *DOJ Report* 251-252. And ownership interests put the professional's interests at odds with his client's: Referrals "would be based on how much [the professional] would receive as compensation, not how much the policy will cost the pur-

---

[2] See *Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs*, Ser. No. 97-24 (Sept. 15-16, 1981) ("*1981 House Hearings*").

chaser." *Id.* at 271-272. "[T]he purchaser is likely to end up (1) paying unreasonably high premiums, (2) accepting unusually poor service, or (3) accepting faulty title examinations and policies * * * ." *Id.* at 273.

The title industry again agreed. In a comprehensive report entitled *The Controlled Business Problem in the Title Insurance Industry* (Nov. 1979) ("*ALTA Report*"), cited in *1981 House Hearings* 153, 161, ALTA observed:

> Without exception, every federal and state agency that has examined the problem, and every knowledgeable observer of the industry who has written about the problem, has concluded that controlled business arrangements are detrimental to competition in the provision of title insurance services and are adverse to the interests of consumers of such services.

Id. at 49.

"[B]uyers and sellers of real estate," ALTA explained, "generally rely on others—whom they perceive or assume to be in a fiduciary relationship with them—to recommend a title insurance service provider." *ALTA Report* 16. "When the real estate professional making the recommendation or referral has no financial stake in the entity to which the title-related business is referred, it is likely that such a recommendation or referral will be made on the basis of that professional's fiduciary responsibilities to consider the buyer's or seller's best interests." *Id.* at 93. But where the entity is an affiliate, "referrals will almost inevitably be made on the basis of the [professional's own] financial interests." *Ibid.* Such arrangements "inevitably result in higher prices" and are "likely to result in a deterioration in the quality" of services. *Id.* at 52, 69.

ALTA's president similarly testified that real estate professionals perform a "critical and often fiduciary role." *1981 House Hearings* 152. One reason RESPA outlawed kickbacks was that they "prejudice the kind of disinterested advice * * * the consumer deserves." *Id.* at 159. The Act thus addressed, in part, the "problem of insuring that the consumer will obtain the disinterested advice of the real estate professional." *Id.* at 153. But further legislation was needed to address "controlled business arrangements," which "are the functional and economic equivalent of kickbacks." *Id.* at 160, 165.

A former HUD official described the relationship between homebuyer and professional as the "same type of trusting or fiduciary relationship" as doctor and patient. *1981 House Hearings* 475. Others agreed: "[W]hen these people who make referrals hold themselves out as giving honest referrals," they have a "fiduciary responsibility or something like fiduciary responsibility * * * ." *Id.* at 140 (FTC official); see also *id.* at 402, 441-442, 463, 470, 472. And "there is no logical basis whatsoever for distinguishing between kickbacks and controlled business arrangements." *Id.* at 476 (former HUD official). In either case, "it is doubtful that [the professional] will put the home buyer's interest first." *Id.* at 475.

As a House report summarized, where services are referred to an affiliate, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service." H.R. Rep. No. 97-532, at 52 (1982). Consequently, consumers are "likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." *Id.* at 51.

HUD-commissioned studies by Peat Marwick showed that even traditional kickbacks remained widespread.

See 2 Peat, Marwick, Mitchell & Co., *Real Estate Closing Costs: RESPA, Section 14a*, at XII.47 (Oct. 1980), cited in *1981 House Hearings* 4, 11; Peat, Marwick, Mitchell & Co., *Research on Real Estate Settlement Practices and Costs: Baseline Study of Title Insurance Industry*, at II.3 (Feb. 1980). Numerous professionals reported that kickbacks were still prevalent, an unsurprising result given the lack of enforcement. See 2 Peat, Marwick (Oct. 1980), *supra*, at XII.47.

2. Accordingly, Congress sought "to clarify that Section 8 of RESPA, the anti-kickback provision, applies in certain circumstances to referrals" among affiliates. H.R. Rep. No. 97-532, at 51. Some witnesses had opposed prohibiting such arrangements, urging that they sometimes benefit consumers. See, *e.g.*, *1981 House Hearings* 46-48. Congress sought a "reasonable reconciliation" that would permit such arrangements only "subject to certain limitations and safeguards that will protect consumers." H.R. Rep. No. 97-532, at 52; see also H.R. Rep. No. 98-123, at 75-78 (1983).

The resulting amendments added a narrow exemption for certain "controlled business arrangements" (later renamed "affiliated business arrangements"). Pub. L. No. 98-181, § 461(a)-(b), 97 Stat. 1153, 1230 (1983) (codified as amended at 12 U.S.C. §§ 2602(7), 2607(c)(4)). That exemption permits referral pay ı among affiliates, but only if the arrangement is di to the consumer, the consumer is not required to e affiliate's services, and the only thing of value exch ..ged between the affiliates is "a return on the ownership interest." 12 U.S.C. § 2607(c)(4).

Congress also strengthened enforcement. The original statute had provided that consumers could recover three times the *kickback*. See pp. 4-5, *supra*. Congress

amended the Act to base recovery on the *settlement charge* paid:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

12 U.S.C. § 2607(d)(2).

C. The Title Insurance Industry

This case concerns title insurance, a settlement service that is a principal focus of RESPA. See, *e.g.*, *HUD-VA Report* 9-10. The title insurance industry is highly concentrated; only a handful of firms control the market. See U.S. Gov't Accountability Office, *Title Insurance: Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers* 11-12 (Apr. 2007) ("*GAO Report*"). Kickbacks and referral fees remain widespread. See *id.* at 27-33; *Title Insurance: Cost and Competition: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services*, Ser. No. 109-88, at 5-6, 30-31, 49, 185 (Apr. 26, 2006) ("*2006 House Hearings*").

Title insurers typically sell policies through separate entities known as title agents. *GAO Report* 7. Title agents provide an array of closing services similar to those once provided exclusively by attorneys: They perform title searches, prepare closing documents, and hold funds in escrow. See *id.* at 9; *2006 House Hearings* 226-234. In at least one role—escrow agent—title agents are fiduciaries of the homebuyer. See, *e.g.*, *Saad* v. *Rodriguez*, 506 N.E.2d 1230, 1233 (Ohio App. 1986). Because of

their role in closings, title agents are uniquely positioned to choose a title insurer for the homebuyer. See J.A. 143.

States generally permit title insurers to compete on price and quality. Only three—Florida, New Mexico, and Texas—prescribe rates, see NAIC Title Insurance Task Force, *Survey of State Laws Regarding Title Data and Title Matters* 8 (Mar. 22, 2010); two of those permit deviations with permission, Fla. Stat. §627.783; N.M. Stat. §59A-30-6(E). Most other States either have "file and use" systems that allow insurers to alter rates without prior approval, or do not regulate rates at all. See NAIC, *supra*, at 8. Most States require that rates not be "excessive, inadequate or unfairly discriminat[ory]." *Id.* at 9. State review, however, is widely criticized as ineffective. See, *e.g.*, *HUD-VA Report* 2 ("largely ineffective"); Peat, Marwick (Feb. 1980), *supra*, at IV.10-11 ("ineffectual" and sometimes "'almost non-existent'"); *GAO Report* 41-43.

Ohio does not fix or require uniformity in title insurance rates. Ohio law expressly provides that it "do[es] not prohibit or discourage reasonable competition, or prohibit or encourage uniformity in insurance rates." Ohio Rev. Code §3935.01. Although rates are subject to review to ensure they are not "excessive, inadequate, or unfairly discriminatory," *id.* §§3935.03(B), 3935.04(A), rates are deemed approved if not rejected within 30 days of filing, *id.* §3935.04(D). Ohio permits title insurers to join a private rating bureau that files rates on its members' behalf. *Id.* §3935.04(B). But insurers are not required to join. *Ibid.* Even if they do, they can depart from the bureau's rate by submitting different rates for approval. *Id.* §3935.07.

II. PROCEEDINGS BELOW

A. Background

1. This case concerns a scheme by petitioners First American Title Insurance Company and First American Financial Corporation (collectively "First American") to pay title agents for referrals by combining those payments with purchases of minority equity stakes. As a former First American vice president explained, the company would purport to pay for an ownership share but would insist on an "Agency Agreement" that "required the title agent[ ] to refer title policies 'exclusively'" to it. J.A. 132. First American's "goal" was to secure those referrals. *Id.* at 130. The equity stakes "were not a primary consideration." *Id.* at 131. Instead, First American was "interested only in acquiring the increased premiums generated by the exclusive agency agreement." *Ibid.*

Discovery materials submitted on remand from the Ninth Circuit confirm that, while First American purported to buy equity stakes, it was primarily paying for referrals. See Appendix of Exhibits in Support of Plaintiff's Motion for Class Certification (Mar. 20, 2011).[3] One internal memorandum explains that First American conducted only an abbreviated review of an agent's financial statements because "the economics of this transaction are driven primarily by the agency relationship and the amount of policy remittances." 1 *id.* at 7. Another states that "most of the value of this minority interest purchase * * * is connected with the exclusive underwriting arrangement." *Id.* at 10. A third states that "[o]ur goal is

---

[3] This appendix is filed in redacted form at Dist. Ct. Dkt. #271-274 and publicly quoted at Dkt. #240-1. First American's application to file the unredacted version under seal, Dkt. #306, was stayed pending this Court's review, Dkt. #324; see also Dkt. #241-243, 275, 281. A copy is available to be lodged pursuant to this Court's Rule 32.3.

to lock up the remittance stream." *Id.* at 12. Yet another states that First American "spent little time analyzing" financial statements because "[p]rotecting [the] title premium remittances [is] far more important." *Id.* at 14. First American routinely valued targets by computing the value of the equity stake and the value of the referrals and combining the two. *Id.* at 33. In at least one case, it paid for an acquisition even though the value of the ownership interest was *negative*. *Id.* at 33-34, 49.

2. One of First American's acquisitions was an Ohio title agent, Tower City Title Agency, LLC. J.A. 62. Tower City had historically issued policies for multiple insurers. *Id.* at 133, 140-141. In 1998, however, First American paid it $2 million for an agreement to issue policies "exclusively" for First American and a 17.5% ownership interest. *Id.* at 62, 65, 72, 92-93. That agreement allowed Tower City to issue a limited number of policies for Stewart Title and to issue policies for other insurers if a customer insisted. *Id.* at 72. In practice, however, Tower City "referred virtually all of its title insurance business to First American." Pet. App. 53a; see J.A. 134. Once again, First American had "one primary objective" in the acquisition: "to increase [its] net premiums." J.A. 135.

Respondent Denise Edwards contracted with Tower City to handle the closing on her 2006 purchase of a Cleveland home. See J.A. 88-90; Pet. App. 53a-54a, 57a. Tower City performed the title examination, prepared documents, and handled the escrow. See J.A. 89. Consistent with its exclusive referral agreement, Tower City referred the title insurance to First American, which issued owner's and lender's policies. Pet. App. 54a. Ms. Edwards paid $455.43 for those insurance contracts. J.A. 89. Tower City also gave Ms. Edwards a "privacy policy" describing how it "safeguard[ed] customer information."

Id. at 106-108. That policy mentioned an affiliation with First American, but not the fact that First American had paid Tower City for exclusive referrals. *Ibid.*

B. Proceedings in the District Court

1. Ms. Edwards filed suit in the U.S. District Court for the Central District of California, where First American is headquartered. Pet. App. 48a-60a. "Congress," the complaint explained, "enacted RESPA in 1974 to ensure consumers were 'protected from unnecessarily high settlement charges' that resulted from 'abusive practices' such as 'kickbacks and referral fees.'" *Id.* at 49a ¶2. "Despite the law's prohibitions," First American had "embarked on a nationwide policy * * * [of] paying large sums of money to individual title agencies * * * in exchange for exclusive referral agreements * * *." *Id.* ¶3. It had "created undisclosed 'Captive Title Insurance Arrangements,' which are prohibited by RESPA precisely because of their potential for harm to consumers." *Ibid.* When Ms. Edwards purchased her home, Tower City "referred the title insurance to First American" pursuant to one such arrangement. *Id.* at 53a-54a ¶¶22-25. Ms. Edwards sought to represent a class of similarly situated consumers. *Id.* at 49a ¶4.

Ms. Edwards alleged that First American had injured her by "denying [her] critical information about the cost of title insurance, in a way calculated—to quote Congress's words from 1974—'to increase unnecessarily the costs' of title insurance." Pet. App. 49a ¶5. She alleged she had "paid $455.43" for the insurance. *Id.* at 53a-54a ¶24. She alleged she had received, not a disinterested referral, but a referral "[p]ursuant to [First American's] Captive Title Insurance Arrangement." *Id.* at 54a ¶25. And she alleged that First American "violated RESPA with respect to Plaintiff and the Class by giving, paying

or receiving fees, kickbacks or other things of value" for referrals. *Id.* at 57a-58a ¶39.

First American did not claim it qualified for RESPA's "affiliated business arrangement" exception. To the contrary, it acknowledged that the exception was inapplicable because it lacked a sufficient ownership stake in Tower City. See J.A. 162-163 n.17. First American also failed to qualify because it did not disclose the referral agreement as required by 12 U.S.C. §2607(c)(4)(A). And the consideration paid under the arrangement was not limited to a "return on [an] ownership interest." 12 U.S.C. §2607(c)(4)(C).

2. First American moved to dismiss, urging that Ms. Edwards lacked standing because she had not paid an "overcharge." See Pet. App. 13a, 19a. Ms. Edwards responded that no overcharge was necessary because she had been denied "a right created by Congress and expressly protected by federal law: the right to purchase title insurance in a transaction that was not the result of an illegal kickback." J.A. 44. The district court agreed and denied the motion. Pet. App. 19a, 21a.

Ms. Edwards moved to certify a nationwide class of consumers, Pet. App. 24a-25a, and a smaller class of Tower City customers, *id.* at 32a. The district court denied both motions. *Id.* at 25a-28a, 40a.

C. The Court of Appeals' Decision

Ms. Edwards appealed the denials of class certification under Federal Rule of Civil Procedure 23(f). See J.A. 14, 24. The court of appeals reversed the order denying certification of the Tower City class and remanded for discovery on the nationwide class. Pet. App. 8a-11a. In a separate opinion, it rejected First American's arguments that Ms. Edwards lacked standing. *Id.* at 1a-7a.

The court of appeals first held, as a statutory matter, that "RESPA gives rise to a statutory cause of action whether or not an overcharge occurred." Pet. App. 4a. The court then held that Ms. Edwards had constitutional standing. Quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), it noted that "'[t]he injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'" Pet. App. 4a. The court found that principle applicable here. *Id.* at 4a-7a. Those holdings, it noted, were consistent with decisions of two other circuits. *Id.* at 7a (citing *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); and *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009)).

The court of appeals denied rehearing en banc. Pet. App. 41a. This Court granted review, limited to the constitutional question. J.A. 165.

SUMMARY OF ARGUMENT

I. This Court has repeatedly recognized that the "injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted). While Article III limits Congress's authority to create such rights, that authority at least extends to protecting interests sufficiently concrete and personal to have been deemed legally protectable at the time the Constitution was adopted. Petitioners agree that Congress can "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" Pet. Br. 15-16 (quoting *Lujan*, 504 U.S. at 578). Congress did exactly that here.

A.-B. For centuries, courts have recognized a party's interest in receiving services free from kickbacks or

other conflicts of interest to be a concrete interest capable of legal protection, wholly apart from any economic harm. The longstanding rule—known today as the "no-further-inquiry rule"—is that courts will permit challenges to conflicted transactions without any inquiry into whether the conflict caused economic loss.

C. Congress followed that settled rule here. Recognizing that consumers repose trust in real estate professionals, Congress banned the kickbacks that place those professionals' interests at odds with their clients'. Consistent with the traditional no-further-inquiry rule, Congress authorized consumers to seek redress for violations from the payer or recipient of the kickback without any proof of economic harm.

The no-further-inquiry rule rests on the presumption that conflicts of interest cause hard-to-detect economic harm. It also reflects the law's determination that those in a position of trust should not profit from breaches of their duties. Both rationales apply fully to RESPA.

D. That Congress imposed a targeted duty to avoid particular conflicts rather than a broad fiduciary duty to avoid all conflicts does not undermine RESPA's constitutionality. The scope of the duty and resulting legal protections affects neither the nature of the protected interest nor the injury that results from its invasion.

E. Petitioners' economic-harm arguments are irrelevant. The whole point of the no-further-inquiry rule is to foreclose consideration of such matters. Besides, the claim that Ms. Edwards could not have suffered economic harm distorts both state law and economics.

II. RESPA is independently valid as an exercise of Congress's broader power to "'*define* injuries and articulate chains of causation that will give rise to a case or con-

troversy where none existed before.'" *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (emphasis added).

A. Congress can create new legal rights and provide remedies for their violation. Thus, a housing-discrimination tester has standing to sue for violation of her statutory right to accurate housing information, even if she has no intention of purchasing a home. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982). Congress has enacted numerous statutes that similarly provide redress for infringement of new legal rights.

B. The principle that violations of personal legal rights give rise to justiciable controversies rests on firm historical ground. The law has long treated invasions of legal rights as cognizable injuries, redressable through nominal or statutory damages even absent further harm.

C. RESPA is a particularly modest exercise of Congress's authority. It reflects a reasonable presumption of economic harm. It prevents unjust enrichment. And it provides redress only to specific consumers who paid money in a transaction. RESPA thus has firm roots in the law.

D. This Court should not rewrite constitutional standing principles to address asserted defects in class action litigation. Policy arguments for or against class actions are properly addressed to Congress.

ARGUMENT

By limiting federal courts to deciding "Cases" or "Controversies," U.S. Const. art. III, §2, the Framers confined the exercise of judicial power to "cases of a Judiciary Nature," 2 *The Records of the Federal Convention of 1787*, at 430 (Farrand ed., 1911) (Madison). Consistent with that limitation, courts lack jurisdiction unless the plaintiff has standing: The plaintiff must show an "in-

vasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent," that is "fairly traceable to the challenged action," and that is "likely * * * [to] be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (alterations and quotation marks omitted). By restricting the judiciary to "the traditional role of Anglo-American courts," those requirements preserve "'the proper—and properly limited—role of the courts in a democratic society.'" *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

Although Article III's injury-in-fact requirement is a "hard floor" that "cannot be removed by statute," *Summers*, 129 S. Ct. at 1151, Congress plays a crucial role. The "'injury required by Art[icle] III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing."'" *Lujan*, 504 U.S. at 578 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)). Because "legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature," "standing['s] * * * existence in a given case is largely within the control of Congress." A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). Whatever the full scope of Congress's authority, all agree it encompasses the power to "'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" Pet. Br. 15-16 (quoting *Lujan*, 504 U.S. at 578).

That principle is sufficient to resolve this case. RESPA does not authorize citizen suits based on undifferentiated concerns about proper administration of the law. It permits one party to a specific financial transaction to claim that his contractual counterparty breached a duty

owed to him to avoid a specific conflict of interest, and to recover money he paid to that other party. That is precisely the sort of concrete dispute that has been "the traditional concern of the courts at Westminster" since well before the Constitution's framing. *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

For centuries, the law has recognized receipt of services encumbered by kickbacks or other conflicts of interest to be a concrete injury capable of judicial vindication, even without any resulting economic harm. In enacting RESPA, Congress recognized that consumers trust real estate professionals to make disinterested referrals, and granted them a right to receive services free from kickbacks that put those professionals' interests at odds with their own. RESPA is thus a straightforward exercise of Congress's authority to elevate *de facto* injuries to legal status. It also falls squarely within Congress's broader power to define new injuries and provide redress. Ms. Edwards' complaint alleges facts establishing that First American violated her legally protected rights in a specific financial transaction. See Pet. App. 48a-49a, 54a, 57a-58a (Compl. ¶¶1-5, 25, 39). Article III requires no more.

I. RESPA Validly Extends Legal Protection To Interests Long Recognized To Be Protectable

"[H]istory is particularly relevant to the constitutional standing inquiry since * * * Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, history is often "well nigh conclusive." *Id.* at 777; *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 285

(2008). Petitioners concede that history is critical. See Pet. Br. 18. But they offer no analysis of whether the type of dispute at issue here—a suit over conflicts of interest in a transaction with no claim of economic loss—was "traditionally amenable to, and resolved by, the judicial process." *Vermont Agency*, 529 U.S. at 774. Petitioners thus fail to address whether the purchaser in such a transaction traditionally had a "concrete, *de facto* injur[y]" the law could "elevat[e]" to legal status. *Lujan*, 504 U.S. at 578. Apart from an isolated reference to James Madison (at 18), petitioners ignore history entirely.

There is good reason for that omission: More than 250 years of precedent refute their position. Courts have long allowed suits for breaches of duties to avoid conflicts of interest in a transaction. Courts did not merely refrain from inquiring into whether the conflict affected price or quality. They expressly held that no such inquiry was permitted. As this Court stated over 160 years ago, in "every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing * * * and his own individual interest," the plaintiff may sue "without any further inquiry" into the transaction's terms. *Michoud* v. *Girod*, 45 U.S. 503, 553, 559 (1846).

RESPA follows that settled tradition. Recognizing that kickbacks undermine the incentives of real estate professionals to obtain the best deal for their customers, Congress granted consumers a statutory right to receive settlement services free from kickbacks. Under long-established principles, the invasion of that legally protected interest is itself injury-in-fact, whether or not the consumer pays more or receives worse service.

A. Framing-Era Courts Routinely Allowed Suits over Conflicted Transactions with No Further Inquiry into Economic Harm

The law has long barred individuals occupying positions of trust from engaging in transactions that place their own interests at odds with the interests of those they serve. A trustee may not purchase property from his trust. See *Restatement (Second) of Trusts* §170 & cmt. b (1959). And an agent may not take bribes from third parties. See *Restatement (Second) of Agency* §388 (1958). The law has also long provided that those who ignore those duties may be forced to return fees, disgorge profits, or submit to other relief *with no further inquiry into whether the conflict of interest caused any additional harm*. That rule—known today as the "no-further-inquiry" rule—is fatal to petitioners' position.

1. *English Law*

The no-further-inquiry rule was recognized in English precedents more than half a century before the Constitution's framing. In *Keech* v. *Sandford*, Sel. Cas. t. King 61, 62, 25 Eng. Rep. 223, 223-224 (Ch. 1726), the Chancellor ordered a trustee to disgorge profits he had made by renewing for his own benefit a lease held by the trust, even though the trust itself could not have renewed the lease and thus suffered no loss. In *Whelpdale* v. *Cookson*, 1 Ves. Sen. 9, 27 Eng. Rep. 856 (Ch. 1747), the Chancellor allowed a suit against a trustee for self-dealing, even though he was "the best bidder * * * at a public sale." And in *Davison* v. *Gardner* (Ch. 1743), ms. rep. in 1 W. Cruise, *A Digest of the Laws of England Respecting Real Property* 551-552 (1804), the Chancellor held that a trustee could be sued for purchasing from a minor's trust, "though the transaction be fair and honest, and as high or higher a price given than any other person would give."

Framing-era English cases followed suit. In *Campbell* v. *Walker*, 5 Ves. Jun. 678, 678, 680, 31 Eng. Rep. 801, 801-802 (Ch. 1800), the court allowed a suit even though "the sales were perfectly fair and open" and there was "no evidence" the property was not "sold at the utmost value." In *Ex parte James*, 8 Ves. Jun. 338, 347-348, 32 Eng. Rep. 385, 389 (Ch. 1803), the court allowed a challenge even though the price was "understood to be the full value" and there was "no reason to think, the sale was not fairly had." In *Randall* v. *Errington*, 10 Ves. Jun. 424, 428, 32 Eng. Rep. 909, 911 (Ch. 1805), the court held: "The trustee cannot protect himself from the effect of the rule by saying, 'You have got as good a price as you could have got from any other person.' The [beneficiary] * * * has a right to whatever profit or advantage the trustee has made by the purchase."

Many other authorities agreed.[4] As the House of Lords later ruled:

> So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. * * * It may sometimes happen that the terms * * * have been as good as could have been obtained from any other

---

[4] See, *e.g.*, *Crowe* v. *Ballard*, 3 Bro. C.C. 117, 120, 29 Eng. Rep. 443, 445 (Ch. 1790); *Ex parte Reynolds*, 5 Ves. Jun. 707, 707, 31 Eng. Rep. 816, 816 (Ch. 1800); *Ex parte Lacey*, 6 Ves. Jun. 626, 628, 31 Eng. Rep. 1228, 1229 (Ch. 1802); *Lister* v. *Lister*, 6 Ves. Jun. 631, 632-633, 31 Eng. Rep. 1231, 1231-1232 (Ch. 1802); *Ex parte Bennett*, 10 Ves. Jun. 382, 393-395, 32 Eng. Rep. 893, 897-898 (Ch. 1805); E. Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* 293-308 (1805). A trustee could transact business with his beneficiary so long as he made full disclosure, the beneficiary was competent, and there was no overreaching. See *Coles* v. *Trecothick*, 9 Ves. Jun. 234, 246-248, 32 Eng. Rep. 592, 597-598 (Ch. 1804). A beneficiary could thus authorize an otherwise conflicted transaction.

> person—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

Aberdeen Ry. Co. v. *Blaikie Bros.*, 1 Macq. 461, 471-472, [1843-60] All E.R. Rep. 249, 252-253 (H.L. 1854).

2. *American Law*

Early American cases similarly allowed suits over conflicted transactions without proof of economic harm. In *Davoue* v. *Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816), Chancellor Kent allowed a devisee to sue an executor for selling estate property to his wife. It made no difference that the sale was "at public auction, and *bona fide*, and for a fair price." *Id.* at 256. Tracing the rule back to Roman law, Chancellor Kent held that the plaintiff could sue "without showing actual injury" beyond the conflicted transaction itself. *Id.* at 257-271. Similar cases abound.[5]

Justice Story explained that a beneficiary could sue his trustee for self-dealing "without showing essential injury" from the transaction, "however innocent the purchase." 1 J. Story, *Commentaries on Equity Jurispru-*

---

[5] See, *e.g.*, *Lessee of Lazarus* v. *Bryson*, 3 Binn. 54, 58, 62-64 (Pa. 1810); *Butler* v. *Haskell*, 4 Des. Eq. 651, 702-706 (S.C. Ch. 1817); *Currier* v. *Green*, 2 N.H. 225, 225-226 (Super. Ct. 1820); *Ryden* v. *Jones*, 1 Hawks 497, 499-501, 505 (N.C. 1821); *Harrod* v. *Norris' Heirs*, 11 Mart. (o.s.) 297, 298-300 (La. 1822); *Mills* v. *Goodsell*, 5 Conn. 475, 478-479 (1825); *Carter* v. *Harris*, 4 Rand. 199, 204-205 (Va. 1826); *Rogers* v. *Rogers*, 3 Wend. 503, 516-517 (N.Y. 1829); *Brackenridge* v. *Holland*, 2 Blackf. 377, 380-382 (Ind. 1830); *Boyd* v. *Hawkins*, 2 Dev. Eq. 195, 207-208 (N.C. 1832); *Ex parte Wiggins*, 1 Hill Eq. 353, 354-356 (S.C. Ch. 1833); *Campbell* v. *Pa. Life Ins. Co.*, 2 Whart. 53, 63-64 (Pa. 1837); *Walton* v. *Torrey*, Harr. 259, 263-264 (Mich. Ch. 1841); *Wade* v. *Pettibone*, 11 Ohio 57, 59-61 (1841); *Thorp* v. *McCullum*, 1 Gilm. 614, 625-627 (Ill. 1844); *Creagh* v. *Savage*, 9 Ala. 959, 962-963 (1846); *White* v. *Trotter*, 14 S. & M. 30, 42-46 (Miss. 1850).

dence §322, at 318 (1836). "[T]he doctrine applies," he observed, "not only to trustees strictly so called, but to other persons standing in like situations * * * ." *Id.* §§322-323, at 318-319; see also 4 J. Kent, *Commentaries on American Law* 437-438 (3d ed. 1836). Likewise, an agent "forfeit[ed] his commissions" if he "act[ed] adversely to his [principal's] interests." J. Story, *Commentaries on the Law of Agency* §334, at 342 (1839).

By 1846, this Court had recognized the same rule. "[I]t makes no difference," the Court held, whether "a sale was at public auction, *bona fide*, and for a fair price * * * ." *Michoud* v. *Girod*, 45 U.S. 503, 557 (1846). Courts would allow challenges "without any further inquiry." *Id.* at 553. That rule applied to "every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing * * * and his own individual interest." *Id.* at 559. This Court has repeatedly reaffirmed that rule since. See, *e.g.*, *Magruder* v. *Drury*, 235 U.S. 106, 118-120 (1914); *Woods* v. *City Nat'l Bank & Trust Co. of Chi.*, 312 U.S. 262, 267-268 (1941); see also *Wormley* v. *Wormley*, 21 U.S. 421, 463 (1823) (Johnson, J., concurring).

That remains black-letter law today. Beneficiaries may sue trustees for "any profit made" by self-dealing and any "commission or other compensation" received. *Restatement (Third) of Trusts: Prudent Investor Rule* §§205, 206 cmts. a, k (1992). "[U]nder the no-further-inquiry rule, it is immaterial" whether the trust received "a fair consideration." *Restatement (Third) of Trusts* §78 cmt. d (2007); see also 3 A. Scott *et al.*, *Scott and Ascher on Trusts* §17.2, at 1077-1136 (5th ed. 2007); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* §543, at 217-269 (2d rev. ed. 1993). Similarly, an agent "forfeit[s] commissions and other compensation" for a

breach of fiduciary duty, and the principal can sue to recover amounts paid, "even though the principal cannot establish that the agent's breach caused loss." *Restatement (Third) of Agency* § 8.01 cmt. d(1)-(2) (2006); see also W. Seavey, *Handbook of the Law of Agency* § 155(E), (I), at 253-255 (1964).

More than two centuries of authority thus make clear that, where a defendant violates a duty to avoid conflicts in a transaction, the plaintiff may sue *without showing any further harm*. That rule reflected the law's judgment that the interest in receiving services free from such influences was *itself* a concrete interest worthy of protection. And while the law protected that interest in part for instrumental reasons—to prevent likely but hard-to-detect economic harm, see pp. 28-29, *infra*—history leaves no doubt that the interest was protectable in its own right.

B. The No-Further-Inquiry Rule Applies to Kickbacks

Kickbacks represent paradigmatic conflicts of interest to which the no-further-inquiry rule applies. Such payments self-evidently tend to "introduce a selfish interest" into a transaction. Bogert & Bogert, *supra*, § 543(P), at 382-383. Even though "[i]t is often impossible to prove that the [recipient] has been influenced," those payments foster "favor[] [for] the persons who make [them], regardless of merit." *Id.* at 383. The recipient may be "tempted to place [business] with the company * * * even though that might not be for the best interest of the beneficiary." *Restatement (Second) of Trusts* § 170 cmt. o.

Accordingly, "[i]t is perfectly clear * * * that a trustee * * * who receives a bribe from a third person * * * is accountable for the bribe." 2A A. Scott & W. Fratcher, *The Law of Trusts* § 170.22, at 415 (4th ed. 1987). The benefi-

ciary can sue "even though no damage to the trust is shown." Bogert & Bogert, *supra*, §543(P), at 382; see also *Restatement (First) of Restitution* §197 & cmt. c (1937); *Restatement (Second) of Agency* §403 & cmt. a.

It is equally clear that liability extends beyond the kickback's recipient. The party paying the bribe is liable for procuring the breach; he too can be sued for disgorgement of any benefits received. See 3 A. Scott, *The Law of Trusts* §506, at 2429 (1939); *Restatement (First) of Restitution* §138(2); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 254, 256 (1993).

This Court applied the no-further-inquiry rule to kickbacks a century ago in *United States* v. *Carter*, 217 U.S. 286 (1910). The government, it held, could sue for disgorgement of kickbacks that contractors paid to a federal officer whether or not the contractors charged more or did inferior work:

> It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from [a third] party, to say, "* * * [Y]ou cannot show that you have sustained any loss by my conduct." Such an agent has the power to * * * hide the injury done his principal. * * * The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.

Id. at 305-306.

C. RESPA Follows the Traditional No-Further-Inquiry Rule

1. *RESPA Invokes the No-Further-Inquiry Rule To Protect Homebuyers from Kickbacks*

RESPA falls squarely within that longstanding tradition. Because homebuyers trust real estate professionals, they "ordinarily accept the services—and prices—of whomever [they are] referred to." *1972 House Hearings* 22 (HUD Secretary). Whether or not the professionals are fiduciaries under state law, homebuyers generally "*perceive or assume* [them] to be in a fiduciary relationship." *ALTA Report* 16 (emphasis added). Professionals who "hold themselves out as giving honest referrals" thus have a "fiduciary responsibility or something like fiduciary responsibility." *1981 House Hearings* 140 (FTC official); see also *ALTA Report* 93 ("fiduciary responsibilities"); *1981 House Hearings* 152 ("critical and often fiduciary role"); *id.* at 475 ("trusting or fiduciary relationship"); *id.* at 402, 441-442, 463, 470, 472.

Kickbacks betray that trust. Professionals taking kickbacks base referrals on "how much [they] would receive as compensation, not how much the policy will cost the purchaser." *DOJ Report* 272. Kickbacks thus "prejudice the kind of disinterested advice * * * the consumer deserves." *1981 House Hearings* 159 (ALTA); see also H.R. Rep. No. 97-532, at 52 (1982) (referrals "may lose [their] impartiality"); *1981 House Hearings* 475 (professional unlikely to "put the home buyer's interest first"); *1972 House Hearings* 3 (consumer's "interests often come last"); *id.* at 621-622, 701; *ALTA Report* 93.

Accordingly, just as courts have long imposed a duty to forgo kickbacks on trustees, agents, and others occupying positions of trust, RESPA imposes that duty on real estate professionals. 12 U.S.C. §2607(a). Just as

courts traditionally allowed suits for violations of that duty without regard to economic harm, RESPA permits homebuyers to sue without proving economic harm. *Id.* § 2607(d)(2). And just as courts allowed suits against the third party that paid the kickback for inducing the fiduciary's breach, see p. 26, *supra*, RESPA allows suits against the settlement service provider that paid the kickback, 12 U.S.C. § 2607(a), (d)(2).

Indeed, during the 1972 hearings, a witness specifically quoted *Magruder*—one of this Court's leading no-further-inquiry precedents—in urging that "'[i]t is a well-settled rule that a Trustee can make no profit out of its Trust'" and must "account to the trust estate for [any] commission" received. *1972 House Hearings* 621 (quoting 235 U.S. at 119). Congress thus did nothing more than "elevat[e]" to legal status the same "concrete, *de facto* injur[y]"—invasion of the interest in receiving kickback-free services—the law has long redressed in other relationships. *Lujan*, 504 U.S. at 578.

2. *The Rationales for the No-Further-Inquiry Rule Apply Here*

RESPA does not merely redress invasions of an interest long deemed legally protectable. It does so in a context where the traditional rationales for protection apply.

Courts articulated multiple rationales for the no-further-inquiry rule. First, conflicts of interest are likely to cause economic harm, but that harm is hard to detect. "[N]o Court is equal to the examination and ascertainment of the truth in much the greater number of cases," so "the general interests of justice requir[e] [conflicted transactions] to be destroyed in every instance." *James*, 8 Ves. Jun. at 345, 32 Eng. Rep. at 388; see also *Ex parte Bennett*, 10 Ves. Jun. 382, 385-386, 32 Eng. Rep. 893, 894 (Ch. 1805). "[T]he trustee [may have] made a bargain

advantageous to himself * * * , and yet the party not have it in his power, distinctly and clearly, to show it." *Davoue*, 2 Johns. Ch. at 260-261. To avert the "danger of imposition inaccessible to the eye of the court," *Michoud*, 45 U.S. at 557, courts conclusively *presumed* economic harm due to its likelihood but difficulty of proof. Similar approaches recur throughout the law, from defamation to copyright. See pp. 47-49, *infra*.

Second, courts sought to prevent unjust enrichment. "[N]o trustee shall ever be permitted to gain an advantage by selling to himself * * * ." *Campbell*, 5 Ves. Jun. at 680, 31 Eng. Rep. at 802; see also *Whichcote* v. *Lawrence*, 3 Ves. Jun. 740, 752, 30 Eng. Rep. 1248, 1254 (Ch. 1798). Disgorgement of profits or compensation was thus a customary remedy. See, *e.g.*, *Keech*, Sel. Cas. t. King at 62, 25 Eng. Rep. at 224. That rationale too reflects principles accepted throughout the law. See pp. 49-50, *infra*.

Those same rationales apply here. As in traditional fiduciary relationships, kickbacks paid to real estate professionals tend to increase prices and impair quality by undermining incentives to act in the customer's best interests. See pp. 2-7, *supra*. For example, ALTA reported that, "[w]ithout exception, every federal and state agency that has examined the problem * * * has concluded that controlled business arrangements are * * * adverse to the interests of consumers," that they "inevitably result in higher prices," and that they are "likely to result in a deterioration in * * * quality." *ALTA Report* 49, 52, 69; see also A. Hofflander & D. Shulman, *The Distribution of Title Insurance*, 44 J. Risk & Ins. 435 (1977). The evidence continues to mount. See, *e.g.*, *GAO Report* 27-33; *2006 House Hearings* 6, 30, 31; B. Birnbaum, *An Analysis of Competition in the California Title Insurance and Escrow Industry* 27-60 (Dec. 2005).

Evidence also showed that such harm is hard to prove. See, *e.g.*, *1972 House Hearings* 3 ("impossible to determine without an audit"); *id.* at 1236 ("lack of good data"); Peat, Marwick (Feb. 1980), *supra*, at III.1 ("inconsistent accounting practices, ambiguous categorizations, and a lack of an effective means of verifying the reported information"); *1981 House Hearings* 514-515. Even state regulators confess difficulty "determining the extent of potentially excessive costs." *GAO Report* 42-43.

The second rationale—preventing unjust enrichment—similarly applies. RESPA directly tracks traditional disgorgement remedies. The Act originally based recovery on the amount of the kickback. Pub. L. No. 93-533, §8(d)(2), 88 Stat. 1724, 1728 (1974). That remedy reflected the longstanding rule that a fiduciary who accepts a bribe must forfeit the bribe to his principal. See, *e.g.*, *Restatement (Second) of Agency* §403. Congress then amended the Act to base recovery on the settlement charge. 12 U.S.C. §2607(d)(2). That too reflects a longstanding rule—that a disloyal fiduciary forfeits his compensation. See, *e.g.*, *Restatement (Second) of Agency* §469 & cmt. e.

RESPA provides for threefold recovery. 12 U.S.C. §2607(d)(2). But such remedies are well-established. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580-581 & n.33 (1996). One Roman law provision Chancellor Kent cited in *Davoue* imposed a "fourfold penalty" for self-dealing. *The Digest of Justinian* bk. 18, tit. 1, ch. 46 (Watson trans., 1985), cited in 2 Johns. Ch. at 270. And a title industry model code imposed a *fivefold* penalty. *1972 House Hearings* 545. For defendants, RESPA is a bargain by comparison. Besides, as petitioners concede (at 38-39 n.19), merely increasing the *amount* of recovery cannot defeat standing. Although a plaintiff must "dem-

onstrate standing separately for each *form* of relief sought," *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added), this Court has never tied the required showing to the *amount* sought. Given the longstanding tradition of requiring refunds, requiring a threefold payment cannot erase an injury that otherwise exists.

D. Petitioners' Attempts To Avoid the No-Further-Inquiry Rule Fail

1. *Congress Properly Applied the No-Further-Inquiry Rule to All Participants in the Breach of a Targeted Duty To Avoid Particularly Egregious Conflicts*

Petitioners try to dismiss centuries of history on the theory that RESPA does not "establish an agency relationship or fiduciary duty running from settlement service providers to customers." Pet. Br. 33. In other words, while Congress could impose a broad fiduciary duty to make referrals in a customer's best interest and allow suits for violations of that duty absent economic harm, petitioners suggest that Congress is constitutionally forbidden from imposing a more modest duty to avoid particularly egregious conflicts—kickbacks—and applying the no-further-inquiry rule to *that* duty.

That is nonsense. Congress can impose fiduciary duties. See, *e.g.*, Investment Company Act of 1940, 15 U.S.C. §80a-35(b). But it is not required to protect an interest wholly or not at all—it need not resolve all problems "in one fell * * * swoop." *Massachusetts* v. *EPA*, 549 U.S. 497, 524 (2007). Here, Congress took a measured approach and imposed a duty to avoid the particularly egregious conflicts that arise from kickbacks. The same underlying "interest" is at stake: the consumer's interest in receiving services free from conflicts of inter-

est. Whether the law prohibits all conflicts or just the most problematic determines when that interest is "legally protected," so that the injury is "elevat[ed]" to legal status. *Lujan*, 504 U.S. at 560, 578. It does not and logically cannot alter the interest or injury itself.

Petitioners insist that, whatever the relationship between *Tower City* and Ms. Edwards, *First American* bears no resemblance to a fiduciary. Pet. Br. 33. But the law has long allowed suits against third parties that procure *another party's* breach of fiduciary duty by paying bribes or kickbacks to it. See p. 26, *supra*. Congress thus could hold First American liable for procuring Tower City's breach. Besides, decisions about which parties to hold liable have no bearing on whether the plaintiff suffered an injury. And Ms. Edwards was First American's customer: She contracted with it and paid it (through its agent) for title insurance—a payment First American obtained by providing a prohibited kickback to the title agent handling her closing. See Pet. App. 53a-54a. First American's relationship with Ms. Edwards could hardly be more direct.

Petitioners urge that Ms. Edwards did not "plead an injury based on a breach of special confidence and trust." Pet. Br. 32. But Ms. Edwards alleged that she received settlement services in violation of her rights under a statute that prohibited kickbacks for her protection. See Pet. App. 48a-49a, 54a, 57a-58a (Compl. ¶¶1-5, 25, 39). A complaint need only set forth "general *factual* allegations of injury." *Lujan*, 504 U.S. at 561 (emphasis added). It need not trace the pedigree of the congressionally established right back to the eighteenth century or defend

Congress's prerogative to recognize invasions as actionable injuries.[6]

Even if there were some difference between the interest protected here and the interest protected by the no-further-inquiry rule for 250 years, the invasion of the consumer's right to kickback-free services is no less "concrete" or "particularized." *Lujan*, 504 U.S. at 560. And the rationales for the no-further-inquiry rule are no less applicable. See pp. 28-30, *supra*. If Congress had imposed a broader fiduciary duty to avoid all conflicts, Justice Story and Chancellor Kent would not have thought twice about allowing suits for violations without any further showing of harm. Congress's more measured approach in RESPA cannot possibly be such a departure from judicial tradition that courts resolving such disputes are exercising something other than the judicial power.

2. *RESPA Does Not Protect a Procedural Right* in Vacuo

Petitioners insist that a purchaser's interest in receiving kickback-free services is a mere "'procedural right *in vacuo*'" that cannot support standing unless it affects some *other* "'concrete interest.'" Pet. Br. 36 (quoting *Summers*, 129 S. Ct. at 1151). But centuries of precedent make clear that a party may vindicate his substantive interest in receiving unconflicted services without any further showing of harm. See pp. 21-26, *supra*. The law deemed a party's interest in receiving such services a

---

[6] Nor are petitioners correct that Ms. Edwards "did not claim that she paid * * * for advice about title insurance or that she did not get what she paid for." Pet. Br. 35 n.17. The no-further-inquiry rule has never been limited to "advice" or to services that were "paid for"—originally, trustees were not paid *at all*. 3 Scott *et al.*, *supra*, § 17.2.8, at 1122. Ms. Edwards was entitled to receive settlement services free from kickbacks; she thus did not "get what she paid for."

"concrete interest" vindicable in its own right, not a mere "procedural right." That interest does not become "procedural" merely because Congress enacted a more focused protection of it.

Conflicts of interest are *presumed* to entail economic harm, so conflicted services are in contemplation of law substantively worse than disinterested services. See pp. 28-29, *supra*. They also unjustly enrich the provider—again, a substantive difference. See p. 29, *supra*. Ultimately, it does not matter *why* the law deemed conflicted services themselves to be an actionable injury. It is clear the law *did* so, and that itself is "well nigh conclusive." *Vermont Agency*, 529 U.S. at 777.

Besides, the right at issue here is not "*in vacuo*." Congress banned kickbacks to protect homebuyers' interests in the settlement services they receive, including their price and quality. Such concrete interests are precisely what the plaintiffs in *Summers* lacked. See 129 S. Ct. at 1151; *id.* at 1153 (Kennedy, J., concurring). Parties with an interest in a substantive result need not allege that different procedures would have produced a different outcome. This Court regularly deems the "inability to compete on an equal footing" sufficient, even absent any allegation that a plaintiff would have competed successfully. See, *e.g.*, *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993). Likewise here, Ms. Edwards need not allege that a disinterested referral would have produced lower prices or better quality. It is sufficient that she suffered an invasion of a right designed to protect her concrete interests.

3. *Petitioners' ERISA Cases Do Not Cast Doubt on 250 Years of Precedent*

Citing a handful of lower-court ERISA cases, petitioners deny that a "violation of a fiduciary duty is injury in itself." Pet. Br. 34-35. But nothing in ERISA contradicts the historic no-further-inquiry rule or the fact that the interests it protects are vindicable under Article III.

ERISA is "inform[ed]" by the law of trusts, but differs in important respects. *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). Among other things, some provisions distinguish between duties owed *to the plan* and duties owed *to beneficiaries*. See *id.* at 507-515. Aside from *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009)—which involved no conflict-of-interest allegations at all—the cases petitioners cite held only that beneficiaries cannot sue to vindicate duties owed *to the plan* if the indirect effects on them are speculative or nonexistent. See, *e.g.*, *Loren* v. *Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-609 (6th Cir. 2007). Two of the cases expressly contrast breaches of fiduciary duties owed *to the claimants themselves*, which *are* "sufficient to establish injury-in-fact." *Id.* at 610; see *Horvath* v. *Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-456 (3d Cir. 2003); see also *Leigh* v. *Engle*, 727 F.2d 113, 121-122 (7th Cir. 1984). In any event, a handful of unreviewed lower-court decisions—none containing any historical analysis—cannot overcome 250 years of precedent.

E. Economic Harm Was Likely Here, But Nonetheless Irrelevant Under the No-Further-Inquiry Rule

Finally, petitioners' repeated refrain about the purported absence of economic harm (at 26-29) is irrelevant. The proper response is the one courts have given for over

250 years: "[S]o inflexible is the rule that *no inquiry on that subject is permitted.*" *Aberdeen Ry.*, 1 Macq. at 472, [1843-60] All E.R. Rep. at 253 (emphasis added). Because the receipt of conflicted services is itself an injury, Article III does not require Congress to carve out exceptions based on a defendant's claims about the economics of a particular case.

In any event, petitioners' suggestion that Ohio's regulatory regime *precludes* economic harm is incorrect. First, whatever the effects of *rate* regulation, kickbacks decrease *quality* by eliminating incentives to compete. The Justice Department found that kickbacks between affiliates are likely to cause "poor service" and "faulty title examinations and policies." *DOJ Report* 273. ALTA warned of a "deterioration in * * * quality" because, while "[h]igh quality service competition is ordinarily an important means" by which insurers compete, controlled business arrangements undermine their "incentive to compete by offering a better quality product or better service." *ALTA Report* 69-70, 75; see also Hofflander & Shulman, *supra*, at 444-445. That potential impact on quality alone justifies Congress's application of the no-further-inquiry rule.[7]

Second, petitioners' efforts to dismiss *price* competition are baseless. Although the court below asserted that "Ohio law mandates that all title insurers charge the same price," Pet. App. 4a, that is not true, Br. in Opp. 6 n.3, and petitioners no longer claim otherwise, cf. C.A. Br. 22, 26. Ohio law expressly states that it does not "encourage," let alone mandate, "uniformity in insurance rates." Ohio Rev. Code § 3935.01. Title insurers can join

---

[7] That those effects were not alleged in the complaint is irrelevant. See pp. 32-33, *supra*. The point is simply that it was not irrational for Congress to invoke the no-further-inquiry rule in RESPA.

a rating bureau and charge identical premiums at the bureau's rate. *Id.* §3935.04(B). But insurers are free to withdraw and file their own rates. *Id.* §3935.04(A), (B). They can also apply to deviate from the bureau's rate while remaining members. *Id.* §3935.07.

That insurers may currently *choose* not to compete on price does not undermine Congress's judgment that they are more likely to do so if kickbacks do not impede the comparison shopping that stimulates competition. See *Am. Needle, Inc.* v. *NFL*, 130 S. Ct. 2201, 2213-2214 (2010). Petitioners label that argument "speculative." Pet. Br. 27. But it is no different from arguments routinely made in antitrust cases. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 342 (1979). Besides, the difficulty of proving those effects is one reason the no-further-inquiry rule exists. See pp. 28-29, *supra*.[8]

Petitioners prophesy that affirmance will open the floodgates to suits by plaintiffs who "fe[el] betrayed." Pet. Br. 33. To decide this case, however, the Court need only reaffirm (yet again) the no-further-inquiry rule that has applied to conflicted transactions for centuries. The

---

[8] Nor does it matter that rates are subject to review by state regulators. Cf. Stewart Br. 12-13. The filed-rate doctrine bars certain challenges to rates approved by federal agencies. See *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986). But "[i]t is absolutely clear that the filed rate doctrine simply does not apply" to RESPA suits because they "challenge [the defendant's] allegedly wrongful conduct" in paying or receiving kickbacks, "not the reasonableness or propriety of the rate." *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 763-765 (3d Cir. 2009). Rating bureaus and state rate regulation were common (and widely criticized) when RESPA was enacted. See *DOJ Report* 261-268; *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 638-640 (1992); p. 10, *supra*. Overwhelming evidence nonetheless showed that prohibiting kickbacks would reduce rates. See pp. 2-8, *supra*.

floodgates have not opened during the past 250 years. There is no reason to expect them to open now.

II. RESPA Is A Valid Exercise Of Congress's Authority To Define Injuries

Even if RESPA went beyond interests courts have protected for centuries, it would still be a permissible exercise of Congress's authority.

A. RESPA Creates Legal Rights, the Invasion of Which Constitutes an Injury

1. *Congress Can Define New Injuries*

Lujan reaffirmed that the "injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights." 504 U.S. at 578 (quotation marks omitted). It identified as an "illustration" of that principle cases where Congress had "elevat[ed] * * * *de facto* injuries" to legal status. *Ibid.* But it did *not* hold that that was the full extent of Congress's power. It expressly left that issue open. *Ibid.*

Justices Kennedy and Souter—whose votes were necessary to the majority—addressed that issue, stating that "Congress has the power to *define* injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." 504 U.S. at 580 (Kennedy, J., concurring in part) (emphasis added). They emphasized that new rights need not "have clear analogs in our common-law tradition." *Ibid.* The Court endorsed their conclusion in *Massachusetts*: "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" 549 U.S. at 516.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), for example, a housing-discrimination "tester" claimed standing based on a violation of her "statutorily

created right to truthful housing information." *Id.* at 374. Invoking the principle that the "injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights," the Court held that "Section 804(d) [of the Fair Housing Act], which * * * establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment." *Id.* at 373 (quotation marks omitted). "A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing"—even if he had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information." *Id.* at 373-374.

Petitioners err in describing the injury in *Havens Realty* as "racial insult and stigma" resulting from the false information. Pet. Br. 15, 30-31. The *only* "'specific injury'" the Court relied on was the plaintiff's "injury to her statutorily created right to truthful housing information." 455 U.S. at 369, 373-374. Indeed, elsewhere in its opinion, the Court *declined* to base standing on lost "social, professional, and economic benefits," remanding because those allegations were too vague. *Id.* at 375-378.[9]

Congress has enacted an array of statutes that authorize statutory damages or other relief for violations of new legal rights.[10] Although some statutes condition recovery

---

[9] In other cases, the Court has mentioned both the denial of information and its impact. See, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 21 (1998). Such impacts may strengthen a claim of standing, but they do not prove that misinformation alone is insufficient when it invades a statutory right. *Havens Realty* also answers petitioners' quibble that the governing principle was only a "dictum" in *Warth*. Pet. Br. 22 n.9. In *Havens Realty*, it was a holding. See 455 U.S. at 373-374.

[10] See, *e.g.*, Expedited Funds Availability Act, 12 U.S.C. § 4010(a); Homeowners Protection Act of 1998, 12 U.S.C. § 4907(a); Anticoun-

on additional harm, see, *e.g.*, *Doe* v. *Chao*, 540 U.S. 614, 620-623 (2004), many do not.[11] While petitioners' *amici* portray those statutes as evidence of a broader problem, see, *e.g.*, Experian Br. 4-5, they actually prove the opposite: that Congress routinely exercises well-accepted authority to define new legal rights. Petitioners' position would work a revolution in the law.

2. *The Injury Congress Defined in RESPA Is Consistent with Article III*

There is "an outer limit to the power of Congress to confer rights of action." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part). "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring

---

terfeiting Consumer Protection Act of 1996, 15 U.S.C. § 1117(c); Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d); Truth in Lending Act, 15 U.S.C. § 1640(a); Fair Credit Reporting Act, 15 U.S.C. § 1681n(a); Equal Credit Opportunity Act, 15 U.S.C. § 1691e; Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a); Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2707(c); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(c); Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2724(b); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(c)(1); Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3); Cable Communications Policy Act of 1984, 47 U.S.C. §§ 551(f)(2), 605(e)(3).

[11] See, *e.g.*, *Beaudry* v. *TeleCheck Servs., Inc.*, 579 F.3d 702, 705-707 (6th Cir. 2009) (Fair Credit Reporting Act); *Robey* v. *Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1211-1212 (10th Cir. 2006) (Fair Debt Collection Practices Act); *Alvarez* v. *Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (Farm Labor Contractor Registration Act); *Dryden* v. *Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) (Truth in Lending Act); *Pure Power Boot Camp, Inc.* v. *Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 427-428 (S.D.N.Y. 2010) (Stored Communications Act).

suit.'" *Massachusetts*, 549 U.S. at 516. That limitation ensures courts do not "'entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.'" *Id.* at 516-517.

RESPA easily satisfies that standard. Congress identified an "injury"—the receipt of settlement services encumbered by kickbacks. See 12 U.S.C. §2607(a), (d)(2). And it "relate[d] the injury to the class of persons entitled to bring suit"—the customer "charged for the settlement service involved in the violation." *Id.* §2607(d)(2). In *Havens Realty*, the Court deemed it sufficient that Congress had prohibited misrepresentations "'to *any person*'" and "creat[ed] * * * an explicit cause of action" in favor of those "'persons.'" 455 U.S. at 373. Congress was no less precise here.

Like the statute in *Havens Realty*, RESPA establishes a right because it imposes mandatory and unambiguous duties designed to protect a particular party's interests. See *Blessing* v. *Freestone*, 520 U.S. 329, 340-341 (1997). Congress vested a right to sue in a specific person—the consumer who paid for the services involved in the violation. 12 U.S.C. §2607(d)(2). It declared its intent to protect *those consumers* from kickbacks that tend to increase the amount *they pay*. *Id.* §2601(b)(2). And it enacted RESPA against a centuries-old backdrop of prohibitions on kickbacks—prohibitions consistently associated with actionable rights.

Petitioners insist that *Havens Realty* is irrelevant because RESPA "does not create any right to information." Pet. Br. 31. To be sure, because petitioners failed to qualify for the "affiliated business arrangement" exemption for multiple reasons, their scheme would be unlawful even if disclosed, which it was not. See p. 14, *supra*. But RESPA's constitutionality does not depend on whether

the right is "informational." RESPA confers a right to kickback-free services, and denials of that right are no less concrete or particularized than denials of the right to truthful information in *Havens Realty*.

RESPA thus addresses a quintessential "concrete and personal" injury. *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part). Congress could have required settlement service providers to warrant contractually that no referral fee was paid and allowed homebuyers to sue for nominal or liquidated damages for any breach. See pp. 44-46, 48-49, *infra*. Congress did not violate Article III by creating a statutory right and remedy instead.

This is not a "'citizen suit[ ]'" by a plaintiff whose only interest is in "'seeing that the law is obeyed.'" Pet. Br. 37-38. Nor is Ms. Edwards suing merely because she "purchased title insurance from a specific First American agent, [while] most of the U.S. population did not." *Id.* at 38. What differentiates *her* injury is that *she* purchased insurance as a result of a prohibited conflict that created incentives to disregard *her* best interests. First American may have sold insurance to a lot of people. But each customer who purchased it in a conflicted transaction suffered a distinct injury, and a concrete injury is not inadequate merely because it is "widely shared." *FEC* v. *Akins*, 524 U.S. 11, 24-25 (1998).

3. *RESPA Does Not Merely Create a Right to Lower Prices*

Citing RESPA's statement of purpose, petitioners and their *amici* insist that, even if Congress did "'identify [an] injury it s[ought] to vindicate and relate the injury to the class of persons entitled to bring suit,'" *Massachusetts*, 549 U.S. at 516, the "injury" Congress identified was higher costs, not kickbacks or conflicts of interest. Pet. Br. 40-41; ALTA Br. 17-25. But the goal RESPA's

statement of purpose identifies is to "eliminat[e] * * * kickbacks or referral fees that *tend to* increase" costs, not just kickbacks *proven in a particular case* to have increased costs. 12 U.S.C. §2601(b)(2) (emphasis added). And the legislative record is full of evidence—including statements from petitioners' *amici*—that one reason Congress prohibited kickbacks was that they "prejudice the kind of disinterested advice * * * the consumer deserves." *1981 House Hearings* 159 (ALTA); see pp. 2-7, *supra*.

Besides, the right a statute secures is determined by its substantive provisions, not its statement of purpose. Congress sought to reduce costs, among other goals, but it did so by conferring a right to kickback-free referrals. 12 U.S.C. §2607(a), (d)(2). Petitioners improperly "'abstract[] from the right to its purposes, and then eliminate[] the right.'" *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Had Congress wanted to protect only a right to lower prices, it would have conditioned recovery on an overcharge. But every court of appeals that has definitively addressed the issue, including the court below, has agreed that it did not. See p. 15, *supra*; U.S. Cert. Br. 13-15. And this is not an appropriate case in which to address that issue given that the Court denied review on the statutory question. J.A. 165.[12]

Congress often protects a right to advance additional goals. Congress created the right to truthful housing information in *Havens Realty* because false information promotes segregation. 455 U.S. at 374 n.14. Because Congress established a right to truthful information *it-*

---

[12] Because this case arises out of Ms. Edwards' Rule 23(f) appeal, this Court can address only subject-matter jurisdiction and class certification; it lacks jurisdiction to decide the scope of the statutory cause of action. See U.S. Cert. Br. 18-19.

self, however, the plaintiff could sue even though she had no "intention of buying or renting a home." *Id.* at 374.

Here, Congress was concerned about *both* conflicts *and* costs because it recognized the relationship between them: Kickbacks cause conflicts, and conflicts tend to increase costs. Congress addressed *both* concerns by attacking the root of the problem—kickbacks. Ms. Edwards was not merely "*potentially* vulnerable to an injury." Pet. Br. 38. She suffered an invasion of the right Congress protected—the right to kickback-free settlement services. Had those kickbacks increased cost or decreased quality, that would have been *another* injury. But a plaintiff only needs one injury-in-fact, not two.

B. The Law Has Long Recognized Invasion of a Legal Right Itself To Be an Injury

Havens Realty was no innovation. For centuries, courts have held that a violation of personal legal rights, with no other ensuing harm, is sufficient to permit a suit.

1. *Nominal Damages*

English courts long ago held that a plaintiff could sue for an invasion of his legal rights without any further harm. In *Ashby* v. *White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703), Lord Holt declared that a plaintiff denied his right to vote could sue even though his vote would not have affected the election's outcome. He stated:

> [E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hind[e]red of his right.

Id. at 955, 92 Eng. Rep. at 137; see also *ibid.* (injury actionable when it is "peculiar to [the plaintiff]" and not

"general and common to all").[13] Blackstone thus wrote: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 W. Blackstone, *Commentaries on the Laws of England* 23 (1768), quoted in *Marbury* v. *Madison*, 5 U.S. 137, 163 (1803); see also, *e.g.*, *Taylor* v. *Henniker*, 12 Ad. & E. 489, 492, 113 Eng. Rep. 897, 898 (Q.B. 1840) (unlawful notice was a "wrongful act" that constituted "legal damage" even though "no real damage was sustained").

The law commonly redresses such violations through nominal damages. In *Whittemore* v. *Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813), Justice Story ruled that a patentholder could recover nominal damages from a defendant who made, but never used or sold, an infringing machine. "Every violation of a right imports some damage," he explained, "and if none other be proved, the law allows a nominal damage." *Id.* at 1121. Similarly, in *Webb* v. *Portland Manufacturing Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838), Justice Story held that a mill owner could sue for a wrongful but otherwise harmless diversion of water. "[W]henever there is a clear violation of a right," he stated, "it is not necessary in an action of this sort to show actual damage * * * ." *Id.* at 509. "The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages * * * ." *Id.* at 508.

This Court similarly held long ago that contracting parties could recover "nominal damages" for a breach that caused no financial harm. See *Wilcox* v. *Plummer's Executors*, 29 U.S. 172, 181-182 (1830). Early treatises

---

[13] Lord Holt spoke in dissent, but the House of Lords reversed and adopted his position. See 2 Ld. Raym. at 958, 92 Eng. Rep. at 138.

confirmed that, "[w]herever the invasion of a right is established, the English law infers some damage to the plaintiff, and if no evidence is given of any particular amount of loss, it awards what it terms nominal damages." T. Sedgwick, *A Treatise on the Measure of Damages* 53 (1847); see also 2 T. Parsons, *The Law of Contracts* 452, 492-494 (1855); J. Chitty, *A Practical Treatise on the Law of Contracts* 685 (2d ed. 1834); T. Fessenden, *An Essay on the Law of Patents* 292 (2d ed. 1822).

That rule endures today. "Nominal damages can be awarded when the defendant has invaded an interest of the plaintiff protected against nonharmful conduct," even if "no harm has been proved." *Restatement (Second) of Torts* § 907 cmt. b (1979); see also *Restatement (Second) of Contracts* § 346(2) (1981). Thus, a "denial of procedural due process [is] actionable for nominal damages without proof of actual injury." *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). By awarding such damages, "the law recognizes the importance to organized society that those rights be scrupulously observed." *Ibid.*

2. *Statutory Damages*

Courts have also long vindicated invasions of legal rights through statutory damages. The first Copyright Act, for example, required infringers to "pay the sum of fifty cents for every sheet," half to the owner and half to the government, without requiring proof of loss. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-125.[14] Early state copyright statutes similarly provided for statutory damages. See *Copyright Enactments of the United States, 1783-1906*, at 11-31 (Solberg 2d rev. ed. 1906); see

---

[14] Although that remedy superficially resembles *qui tam* statutes, the theory was different. Copyright owners were "su[ing] for damages on *both their own and* the United States' behalf." *Vermont Agency*, 529 U.S. at 776 n.5 (emphasis added).

also 17 U.S.C. §504(a)-(c) (owner can elect either "actual damages and profits" *or* "statutory damages"); *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998).

Sedgwick thus observed more than 150 years ago: "There is a large class of cases where the legislature * * * has endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief." Sedgwick, *supra*, at 571. An array of modern provisions follow suit. See pp. 39-40 n.10, *supra*. In *Beaudry* v. *TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009), for example, the court allowed a consumer to seek statutory damages under the Fair Credit Reporting Act, 15 U.S.C. §1681n(a), even though no economic harm ensued. The "injury" was the invasion of her statutory right to accurate reports, not the economic consequences of the violation. 579 F.3d at 705. As Judge Sutton explained, the defendants' contrary argument amounted to a claim that a party must prove "consequential damages" in addition to direct injury. *Ibid.* The law may *permit recovery* of consequential damages, but it hardly *requires* them. So long as there is an adequate connection between the legal violation and the individual plaintiff, "[n]o Article III (or prudential) standing problem arises." *Id.* at 707 (citing *Havens Realty*, 455 U.S. at 373). Petitioners' contrary position would upend centuries of precedent and reams of previously unquestioned federal statutes.

C. RESPA Represents a Modest Exercise of Congress's Authority

RESPA represents a particularly restrained exercise of Congress's power to define new rights.

1. *Presumed Damages*

RESPA closely tracks the longstanding remedy of presumed damages. "'[P]resumed' damages * * * [are]

traditionally part of the range of tort law remedies." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 310 (1986). The law provides such damages as a "substitute for ordinary compensatory damages" where "a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish." *Id.* at 310-311 (emphasis omitted).

For example, a plaintiff slandered in his trade or otherwise defamed *per se* could traditionally sue for "general damages." *Restatement (First) of Torts* §§570, 621 (1938). The law required "no proof of actual injury whatever" and "entitle[d] the plaintiff to such amount as the jury s[aw] fit to give." Sedgwick, *supra*, at 492. The "presumption of law" was that injury ensued as a "natural consequence." *Pollard* v. *Lyon*, 91 U.S. 225, 227 (1876). The plaintiff thus could recover "without proving any particular damage to have happened, but merely upon the probability that it might happen." 3 Blackstone, *supra*, at 124. That presumption was important because defamation's effects are often "so subtle and indirect that [they are] impossible directly to trace." *Restatement (First) of Torts* §621 cmt. a.

Likewise, the law has long allowed contracting parties to presume damages by agreement, "stipulat[ing] for the payment of a certain sum as a liquidated satisfaction." 2 S. Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* 537 (1807). Such clauses represent an "'estimate of the damages * * * by a previous agreement between the parties.'" *Id.* at 538 (quoting *Orr* v. *Churchill*, 1 H. Bl. 227, 232, 126 Eng. Rep. 131, 134 (C.P. 1789)). Courts will not enforce the clauses if they are not reasonable forecasts of harm. See *Restatement (First) of Contracts* §339(1)(a) (1932). But in many jurisdictions, only *ex ante* reasonableness mat-

ters, and "no showing of pecuniary or other actual damages is required." 22 Am. Jur. 2d *Damages* § 528, at 467 (2003); see, *e.g.*, *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105, 118-121 (1907).

Statutory copyright damages are presumed damages: They "give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935). Similarly, in voting-rights cases, courts award "presumed damages for a nonmonetary harm that cannot easily be quantified." *Memphis*, 477 U.S. at 311 n.14. Finally, the no-further-inquiry rule awards presumed damages for conflicted transactions. See pp. 28-29, *supra*.

RESPA is merely a contemporary example of that unbroken tradition. Overwhelming evidence shows that kickbacks tend to increase costs and impair quality, but those effects can be difficult to prove. See pp. 29-30, *supra*. Just as courts have long presumed damages in comparable contexts, Congress was entitled to do so here.

2. *Unjust Enrichment*

RESPA also rests on well-accepted principles of unjust enrichment. "[A]ncient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to 'disgorge'—*i.e.*, account for and surrender—their ill-gotten gains for centuries." *SEC* v. *Cavanagh*, 445 F.3d 105, 116-120 (2d Cir. 2006). Today, those remedies are known as restitution and unjust enrichment. See *Restatement (Third) of Restitution & Unjust Enrichment* (2011).

"Restitution is measured by the defendant's unjust enrichment, not by the plaintiff's loss." 1 D. Dobbs, *Law of Remedies* § 4.5(1), at 628 (2d ed. 1993); see D. Laycock,

The Scope and Significance of Restitution, 67 Tex. L. Rev. 1277, 1279 (1989). Thus, a plaintiff whose rights have been infringed may recover even if he "has not suffered a corresponding loss"—or, indeed, "any loss." *Restatement (First) of Restitution* § 1 cmt. e; see also 1 G. Palmer, *The Law of Restitution* § 2.10, at 133 (1978) ("no economic loss"); 5 R. Pound, *Jurisprudence* 253 (1959) ("no loss at all").

For example, a landowner can recover his land's rental value from a trespasser who uses the land, "even if the plaintiff himself could not reach the land, did not intend to use it, and would not have rented it to others." 1 Dobbs, *supra*, § 5.8(2), at 788-792; see *Restatement (Second) of Torts* § 931 cmt. b. Copyright and trademark owners can sue for disgorgement even if they allege no lost sales. See 17 U.S.C. § 504(b); 15 U.S.C. § 1117(a). Patent owners could too, until Congress withdrew that remedy in 1946. See *Gen. Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 654 (1983). The no-further-inquiry rule is another example. See *Restatement (First) of Restitution* § 197 & cmt. c.

RESPA reflects those settled principles. Where an insurer obtains a homebuyer's business by paying a kickback to her title agent, restitutionary remedies would allow the homebuyer to recover the kickback from the agent and her premium from the insurer, even if she otherwise got what she paid for. See *Restatement (First) of Restitution* §§ 138(2), 197 & cmt. c. The insurer and agent are unjustly enriched at the homebuyer's expense, regardless of any economic harm, because they obtained money in violation of a duty owed to her. Nothing in Article III forecloses those well-accepted remedies.

3. *Payment of Money*

Finally, RESPA provides a right only to consumers who *paid money* in a transaction—"persons *charged* for the settlement service involved." 12 U.S.C. §2607(d)(2) (emphasis added). Ms. Edwards, for example, paid $455.43 for services as a result of First American's kickback scheme. Pet. App. 53a-54a (Compl. ¶¶24-25). A consumer has a concrete and individualized stake in recovering payments that she herself made in an unlawfully procured transaction.

"[T]he expenditure of funds" is "the most mundane of injuries in fact." *Amnesty Int'l USA* v. *Clapper*, 638 F.3d 118, 133 (2d Cir. 2011). Courts often allow consumers to sue for refunds of money paid for unauthorized services, even if the services are otherwise unaffected. If a lay bankruptcy petition preparer gives unauthorized legal advice, the debtor can sue for (among other things) "twice the amount paid * * * for the preparer's services." 11 U.S.C. §110(e)(2), (i)(1)(B). Courts uniformly allow recovery even absent any other harm. See, *e.g.*, *Wynns* v. *Adams*, 426 B.R. 457, 465-466 (E.D.N.Y. 2010), aff'd, No. 10-2138, 2011 WL 2519550 (2d Cir. Jun. 27, 2011); cf. 15 U.S.C. §1640(a)(2)(A) (authorizing suit for refund of "twice the amount of any finance charge"); 2 Comyn, *supra*, at 3, 109 (action for "money had and received").

Under New Mexico law, "an unlicensed contractor may not retain payments made pursuant to a contract," "no matter how expertly [the work is] performed." *Mascarenas* v. *Jaramillo*, 806 P.2d 59, 62-63 (N.M. 1991). California authorizes "a person who utilizes the services of an unlicensed contractor [to] bring an action * * * to

recover all compensation paid." Cal. Bus. & Prof. Code § 7031(b). Several other States take the same approach.[15]

Those remedies derive from the principle that "[u]nlicensed persons who contract to provide services for which a license is required for the purpose of regulation and protection may not recover," even if "the contract has been complied with in all respects." 53 C.J.S. *Licenses* § 117, at 589 (2005); cf. *Weil* v. *Neary*, 278 U.S. 160, 173-174 (1929). Because unlicensed contractors have no right to payment, a customer who *has* paid suffers injury: He has paid money unnecessarily for something for which no payment was due. Ms. Edwards suffered that injury here. Having provided services in violation of prohibitions enacted for her protection, First American was not entitled to payment. Ms. Edwards was injured by paying $455.43 when she owed nothing.

D. The Court Should Not Rewrite Article III To Address Purported Class Action Abuses

Petitioners and their *amici* repeatedly stress that this is a class action. See, *e.g.*, Pet. Br. 42-44; Facebook Br. 14-17. But that is irrelevant. "That a suit may be a class action * * * adds nothing to the question of standing * * *." *Simon* v. *E. Ky. Welfare Rights Org.*, 426

---

[15] See, *e.g.*, N.Y. Real Prop. Law § 442-e(3); Utah Code § 61-2f-405(4); *Marzullo* v. *Molineaux*, 651 A.2d 808, 809-811 (D.C. 1994); *Rubin* v. *Douglas*, 59 A.2d 690, 691 (D.C. 1948); *Cooper* v. *Paris*, 413 So. 2d 772, 773-774 (Fla. Dist. Ct. App. 1982); *Kowalski* v. *Cedars of Portsmouth Condo. Ass'n*, 769 A.2d 344, 347-348 (N.H. 2001); *Rodolitz Org.* v. *Secondary Mortg. Res., Inc.*, 572 N.Y.S.2d 729, 730 (App. Div. 1991); cf. *Hittson* v. *Browne*, 3 Colo. 304, 309 (1877). Most States allow suits to recover amounts already paid only when provided for by statute, regulation, or public policy considerations. See *Remsen Partners, Ltd.* v. *Stephen A. Goldberg Co.*, 755 A.2d 412, 415-421 (D.C. 2000). But the fact that the law may not provide redress does not mean such payments are not injuries.

U.S. 26, 40 n.20 (1976). Nor does it subtract anything. If Ms. Edwards has standing to bring an individual claim, she cannot be denied standing merely because she *also* seeks to represent similarly situated consumers. Petitioners speculate about her motives for not alleging an overcharge. Pet. Br. 42-43. But the rule they seek would apply equally to individual claimants—including those who cannot prove an overcharge simply because they cannot afford an economist to litigate a $500 lawsuit.

One great irony of this case is that, while petitioners and their *amici* purport to be vindicating separation-of-powers principles, they devote inordinate energy to policy arguments about class action "reform" properly directed to the political branches. Petitioners complain that statutory-damages class actions "take advantage of the *in terrorem* effect to pursue a settlement," Pet. Br. 43, but that same argument is made about *all* class actions, see, *e.g.*, G. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522 (1997). The contrary arguments are no less compelling. Consumers like Ms. Edwards could rarely recover *anything* individually because the costs of litigation far exceed the amount at stake (even accounting for an uncertain fee award). See *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974). Whatever the merits of such arguments, *ad hoc* policy concerns should not distort constitutional principles that apply to all cases.

First American's real complaint is not about class action *procedure*, but about the prospect of having to pay the statutorily prescribed amount of damages to all the consumers whose rights it violated. If damages should be limited in class actions, that must be done by Congress, not this Court. See 28 U.S.C. §2072(b). Other provisions of RESPA adjust the amount of damages for

class actions. See 12 U.S.C. §2605(f). Congress simply chose not to write the kickback provision that way.

RESPA is not a private attorney general statute that infringes on the Executive's prerogatives. It simply allows private parties to particular transactions to demand a treble refund when their counterparty violates their *own* statutory rights. Ms. Edwards is not asking this Court to invade the authority of the political branches by superintending public enforcement of the law. She is asking the Court to *uphold* Congress's authority to establish legal rights for her protection. Because doing so respects the traditional role of the political branches without improperly expanding the judiciary's, petitioners' arguments should be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JEFFREY A. LAMKEN
ROBERT K. KRY
MARTIN V. TOTARO
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000

CYRIL V. SMITH
Counsel of Record
CONOR B. O'CROININ
ZUCKERMAN SPAEDER LLP
100 East Pratt Street
Suite 2440
Baltimore, Maryland 21202
(410) 332-0444
csmith@zuckerman.com

RICHARD S. GORDON
MARTIN E. WOLF
GORDON & WOLF CHTD
102 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 825-2300

DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 778-1800

JAMES W. SPERTUS
LAW OFFICES OF
JAMES W. SPERTUS
12100 Wilshire Blvd., Suite 620
Los Angeles, California 90025
(310) 826-4700

EDWARD KRAMER
FAIR HOUSING LAW CLINIC
CLEVELAND-MARSHALL
COLLEGE OF LAW
3214 Prospect Avenue
Cleveland, Ohio 44115
(216) 431-7400

Counsel for Respondent Denise P. Edwards

OCTOBER 2011

APPENDIX

APPENDIX A

The Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601-2617, provides as follows:

Chapter 27—Real Estate Settlement Procedures

§ 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result—

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

§ 2602. Definitions

For purposes of this chapter—

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be

purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "Settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

§ 2603. Uniform settlement statement

(a) The Secretary, in consultation with the Administrator of Veteran's Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage

loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.

§ 2604. Special information booklets

(a) Distribution by Secretary to lenders to help borrowers

The Secretary shall prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services. The Secretary shall distribute such booklets to all lenders which make federally related mortgage loans.

(b) Form and detail; cost elements, standard settlement form, escrow accounts, selection of persons for settlement services; consideration of differences in settlement procedures

Each booklet shall be in such form and detail as the Secretary shall prescribe and, in addition to such other information as the Secretary may provide, shall include in clear and concise language—

(1) a description and explanation of the nature and purpose of each cost incident to a real estate settlement;

(2) an explanation and sample of the standard real estate settlement form developed and prescribed under section 2603 of this title;

(3) a description and explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate;

(4) an explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incident to a real estate settlement; and

(5) an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by

the prospective buyer with respect to a real estate settlement.

Such booklets shall take into consideration differences in real estate settlement procedures which may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

(c) Estimate of charges

Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

(d) Distribution by lenders to loan applicants at time of receipt or preparation of applications

Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

(e) Printing and distribution by lenders of booklets approved by Secretary

Booklets may be printed and distributed by lenders if their form and content are approved by the Secretary as meeting the requirements of subsection (b) of this section.

§ 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the

assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which

the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall—

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes—

(i) to the extent applicable, a statement of the reasons for which the servicer believes the ac-

count of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes—

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) **Protection of credit rating**

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) **Damages and costs**

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of—

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of—

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of—

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

(i) **Definitions**

For purposes of this section:

(1) **Effective date of transfer**

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) **Servicer**

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include—

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the

Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

§ 2606. Exempted transactions

(a) In general

This chapter does not apply to credit transactions involving extensions of credit—

(1) primarily for business, commercial, or agricultural purposes; or

(2) to government or governmental agencies or instrumentalities.

(b) Interpretation

In prescribing regulations under section 2617(a) of this title, the Secretary shall ensure that, with respect to subsection (a) of this section, the exemption for credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, as provided in subsection (a)(1) of this section shall be the same as the exemption for such credit transactions under section 1603(1) of title 15.

§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally

related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the tele-

---

[1] So in original.

phone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate

transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

§ 2608. Title companies; liability of seller

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

§ 2609. Limitation on requirement of advance deposits in escrow accounts

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and

ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided, however*, That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer

shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Secretary shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

(d) Penalties

(1) In general

In the case of each failure to submit a statement to a borrower as required under subsection (c) of this section, the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of $50 for each such failure, but the total amount imposed on such lender or escrow servicer for

all such failures during any 12-month period referred to in subsection (b)[1] of this section may not exceed $100,000.

(2) Intentional violations

If any failure to which paragraph (1) applies is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure—

(A) the penalty imposed under paragraph (1) shall be $100; and

(B) in the case of any penalty determined under subparagraph (A), the $100,000 limitation under paragraph (1) shall not apply.

§ 2610. Prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements

No fee shall be imposed or charge made upon any other person (as a part of settlement costs or otherwise) by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a mobile home), or by a servicer (as the term is defined under section 2605(i) of this title), for or on account of the preparation and submission by such lender or servicer of the statement or statements required (in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C.A. 1601 et seq.].

§§ 2611 to 2613. Repealed. Pub. L. 104-208, div. A, title II, § 2103(b), Sept. 30, 1996, 110 Stat. 3009-401

§ 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United

---

[1] So in original. Probably should be subsection "(c)".

States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

§ 2615. Contracts and liens; validity

Nothing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.

§ 2616. State laws unaffected; inconsistent Federal and State provisions

This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Secretary is authorized to determine whether such inconsistencies exist. The Secretary may not determine that any State law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer. In making these determinations the Secretary shall consult with the appropriate Federal agencies.

§ 2617. Authority of Secretary

(a) Issuance of regulations; exemptions

The Secretary is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Secretary or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Secretary is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Secretary deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Secretary issued under this section, issue an order re-

quiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment—

(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

APPENDIX B

Section 8 of the Real Estate Settlement Procedures Act of 1974, as enacted, Pub. L. No. 93-533, 88 Stat. 1724, 1727, provided as follows:

PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES

SEC. 8. (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, or (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

(d)(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) In addition to the penalties provided by paragraph (1) of this subsection, any person or persons who violate

the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split, or percentage. In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney's fee as determined by the court.

APPENDIX C

Title 39, Chapter 3935 of the Ohio Revised Code provides in relevant part as follows:

Chapter 3935: RATING BUREAUS

3935.01 Effect of sections; liberal interpretation

Sections 3935.01 to 3935.17, inclusive, of the Revised Code do not prohibit or discourage reasonable competition, or prohibit or encourage uniformity in insurance rates, rating systems, rating plans, or practices. Such sections shall be liberally interpreted to carry this section into effect.

3935.02 Application of sections; exceptions

Sections 3935.01 to 3935.17, inclusive, of the Revised Code apply to all kinds of insurance on risks located in this state which stock, mutual, reciprocal fire and marine insurers, and title insurance companies, as defined in division (C) of section 3953.01 of the Revised Code, except mutual protective associations organized under section 3939.01 of the Revised Code, may write.

Sections 3935.01 to 3935.17, inclusive, of the Revised Code do not apply:

(A) To reinsurance, other than joint reinsurance to the extent stated in section 3935.13 of the Revised Code;

(B) To insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies;

(C) To insurance of hulls of aircraft, including their accessories and equipment, or against liability arising out of the ownership, maintenance, or use of aircraft;

(D) To motor vehicles insurance, or to insurance against liability arising out of the ownership, maintenance, or use of motor vehicles;

(E) To casualty insurance, including fidelity, surety, and guaranty bonds whether or not fire insurance companies may write such kinds of insurance.

If any kind of insurance, subdivision or combination thereof, or type of coverage, subject to sections 3935.01 to 3935.17, inclusive, of the Revised Code, is also subject to regulation by other rate-regulatory sections of the Revised Code, an insurer to which both laws are otherwise applicable shall file with the superintendent of insurance a designation as to which of said rate-regulatory sections are applicable to it with respect to such kind of insurance, subdivision or combination thereof, or type of coverage.

3935.03 Rating regulations

Rates shall be made as follows:

(A) Manual, minimum class rates, rating schedules, or rating plans shall be made and adopted, except in the case of specific inland marine rates on risks specially rated.

(B) Rates shall not be excessive, inadequate, or unfairly discriminatory.

(C) Consideration shall be given to:

(1) Past and prospective loss experience within and outside this state;

(2) Conflagration and catastrophe hazards;

(3) A reasonable margin for underwriting profit and contingencies;

(4) Dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers;

(5) Past and prospective expenses both country-wide and those specially applicable to this state;

(6) All other relevant factors within and outside this state;

(7) In the case of fire insurance rates, the experience of the fire insurance business during a period of not less than the most recent five year period for which such experience is available.

Except to the extent necessary to comply with division (B) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited.

Rates made in accordance with this section may be used subject to sections 3935.01 to 3935.17, inclusive, of the Revised Code.

3935.04 Filing of rates and schedules with superintendent; procedure

As used in sections 3935.01 to 3935.17 of the Revised Code, "filing" or "filings" means the whole or any part thereof.

(A) Every insurer shall file with the superintendent of insurance, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every form of a policy, endorsement, rider, manual, minimum class rate, rating schedule, or rating plan, and every other rating rule, and every modification of any of them, which it proposes to use. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports the filing, and the superintendent does not have sufficient information to determine whether the filing

meets the requirements of sections 3935.01 to 3935.17 of the Revised Code, he shall require the insurer to furnish the information upon which it supports the filing, and in such event the waiting period shall commence as of the date the information is furnished. The information furnished in support of a filing may include the experience or judgment of the insurer or rating bureau making the filing, its interpretation of any statistical data it relies upon, the experience of other insurers or rating bureaus, or any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective. Specific inland marine rates on risks specially rated, made by a rating bureau, shall be filed with the superintendent.

(B) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating bureau which makes such filings, and by authorizing the superintendent to accept such filings on its behalf, but sections 3935.01 to 3935.17 of the Revised Code do not require any insurer to become a member of, or a subscriber to, any rating bureau.

(C) The superintendent shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of sections 3935.01 to 3935.17 of the Revised Code.

(D) Subject to the exception specified in division (E) of this section, each filing shall be on file for a waiting period of thirty days before it becomes effective. Upon written application by such insurer or rating bureau, the superintendent may authorize a filing which he has reviewed to become effective before the expiration of the waiting period. A filing complies with sections 3935.01 to 3935.17 of the Revised Code unless it is disapproved by the superintendent within the waiting period.

(E) Specific inland marine rates on risks specially rated by a rating bureau become effective when filed and comply with sections 3935.01 to 3935.17 of the Revised Code until the superintendent reviews the filing and so long thereafter as the filing remains in effect.

(F) Notwithstanding Chapter 119. of the Revised Code, the superintendent may, by written order, without notice or hearing, suspend or modify the requirements of a filing as to any kind of insurance, subdivision or combination thereof, or classes of risks, the rates for which cannot practicably be filed before they are used. Such orders shall be made known to insurers and rating bureaus affected thereby. The superintendent may make such examinations as he deems advisable to ascertain whether any rates affected by such order meet the standards set forth in division (B) of section 3935.03 of the Revised Code.

(G) Upon the written application of the insured, stating his reasons therefor, filed with and approved by the superintendent, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

(H) No insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for the insurer as provided in sections 3935.01 to 3935.17 of the Revised Code or in accordance with division (F) or (G) of this section. This division does not apply to contracts or policies for inland marine risks as to which filings are not required.

3935.05 Processing of filings

(A) If within the waiting period as provided in division (D) of section 3935.04 of the Revised Code, the superintendent of insurance finds that a filing does not meet the requirements of section 3935.01 to 3935.17 of the Revised

Code, he shall send to the insurer or rating bureau that made the filing, written notice of disapproval of the filing, specifying therein in what respects he finds the filing fails to comply with those sections and stating that the filing shall not become effective.

(B) If within thirty days after a specific inland marine rate on a risk specially rated by a rating bureau, subject to division (E) of section 3935.04 of the Revised Code has become effective, the superintendent finds that the filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall send to the rating bureau that made the filing written notice of disapproval of the filing, specifying therein in what respects he finds that the filing fails to comply with those sections and stating when, within a reasonable period thereafter, the filing shall be no longer effective. The disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in the notice.

(C) If at any time subsequent to the applicable review period provided for in divisions (A) or (B) of this section, the superintendent finds that a filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall, after a hearing held upon not less than ten days' written notice, as provided in division (F) of this section, to every insurer and rating bureau that made the filing, specifying the matters to be considered at the hearing, issue an order specifying in what respects he finds that the filing fails to comply with those sections, and stating when, within a reasonable period thereafter, the filing shall be no longer effective. Copies of the order shall be sent to such insurer or rating bureau. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

(D) Any person or organization aggrieved with respect to any filing that is in effect may make written application to the superintendent for a hearing thereon, provided that the insurer or rating organization that made the filing may not proceed under this division. The application shall specify the grounds to be relied upon by the applicant. If the superintendent finds that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty days after receipt of the application, hold a hearing upon not less than ten days' written notice to the applicant and, as provided in division (F) of this section, to every insurer and rating bureau that made such filing.

If, after the hearing, the superintendent finds that the filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall issue an order specifying in what respects he finds that the filing fails to comply with those sections, and stating when, within a reasonable period thereafter, the filing shall be no longer effective. Copies of the order shall be sent to the applicant and to such insurer or rating bureau. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

(E) No manual, minimum class rate, rating schedule, rating plan, rating rule, or any modification of any of the foregoing, which has been filed pursuant to section 3935.04 of the Revised Code shall be disapproved if the rates thereby produced comply with sections 3935.01 to 3935.17 of the Revised Code.

(F) Every rating bureau or organization receiving a notice of hearing or copy of an order under division (C) or (D) of this section shall promptly notify all of its members

or subscribers that would be affected by the hearing or order. Notice to a rating bureau or organization of a hearing or order shall be deemed notice to its members or subscribers.

3935.06 Licenses for rating bureaus; discrimination prohibited; review by superintendent

A corporation, an unincorporated association, a partnership, or an individual, whether located within or outside this state, may make application to the superintendent of insurance for license as a rating bureau for such kinds of insurance, or subdivision or class of risk or a part or combination thereof, as are specified in its application and shall file the following therewith:

(A) A copy of its constitution, of its articles of agreement or association or its certificate of incorporation, and of its bylaws, rules, and regulations governing the conduct of its busiress;

(B) A list of its members and subscribers;

(C) The name and address of a resident of this state upon whom notices or orders of the superintendent, or process affecting such rating bureau, may be served;

(D) A statement of its qualifications as a rating bureau.

If the superintendent finds that the applicant is competent, trustworthy, and otherwise qualified to act as a rating bureau and that its constitution, its articles of agreement or association or certificate of incorporation, and its bylaws, rules, and regulations governing the conduct of its business conform to the law, he shall issue a license specifying the kinds of insurance, or subdivision or class of risk or part or combination thereof, for which the applicant is authorized to act as a rating bureau. Every such application shall be granted or denied in whole or in

part by the superintendent within sixty days of the date of its filing with him. Licenses issued pursuant to this section shall remain in effect for three years unless sooner suspended or revoked by the superintendent. The fee for said license shall be twenty-five dollars. Licenses issued pursuant to this section may be suspended or revoked by the superintendent, after hearing upon notice, in the event the rating bureau ceases to comply with this division. Every rating bureau shall notify the superintendent promptly of every change in any of the items described in divisions (A), (B), and (C) of this section.

Subject to rules and regulations which have been approved by the superintendent as reasonable, each rating bureau shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, or subdivision or class of risk or a part or combination thereof, for which it is authorized to act as a rating bureau. Notice of proposed changes in such rules and regulations shall be given to subscribers. Each rating bureau shall furnish its rating services without discrimination to its members and subscribers. The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating bureau to admit an insurer as a subscriber, shall at the request of any subscriber or any such insurer, be reviewed by the superintendent at a hearing held upon at least ten days' written notice to such rating bureau and to such subscriber or insurer. If the superintendent finds that such rule or regulation is unreasonable in its application to subscribers, he shall order that such rule or regulation is not applicable to subscribers. If the rating bureau fails to grant or reject an insurer's application for subscribership within thirty days after it was made, the insurer may request a review by the superintendent as if the application had been rejected. If the su-

perintendent finds that the insurer has been refused admittance to the rating bureau as a subscriber without justification, he shall order the rating bureau to admit the insurer as a subscriber. If he finds that the action of the rating bureau was justified, he shall make an order affirming its action.

No rating bureau shall adopt any rule which would prohibit or regulate the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

Co-operation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters covered by sections 3935.01 to 3935.17, inclusive, of the Revised Code, is authorized, provided the filings resulting from such co-operation are subject to all such sections which are applicable to filings generally. The superintendent may review such co-operative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order specifying in what respects such activity or practice is unfair, unreasonable, or otherwise inconsistent, and requiring the discontinuance of such activity or practice.

Any rating bureau may provide for the examination of policies, daily reports, binders, renewal certificates, indorsements, or other evidences of insurance, or the cancellation thereof, and may make reasonable rules governing their submission. Such rules shall contain a provision that, in the event any insurer does not within sixty days furnish satisfactory evidence to the rating bureau of the correction of any error or omission previously called to its attention by such rating bureau, the rating bureau

shall notify the superintendent thereof. All information submitted for such examination shall be confidential.

Any rating bureau may subscribe for or purchase actuarial, technical, or other services, and such services shall be available to all members and subscribers without discrimination.

3935.07 Deviation from rates filed by bureau

Every member of, or subscriber to, a rating bureau shall adhere to the filings made on its behalf by the bureau, except that any insurer who is such a member or subscriber may make written application to the superintendent of insurance for permission to file a deviation from the class rates, schedules, rating plans, or rules respecting any kind of insurance or class of risk within a kind of insurance, or combination thereof. Such application shall specify the basis for the modification, and a copy of the application shall be sent simultaneously to the rating bureau. The superintendent shall set a time and place for a hearing at which the insurer and the rating bureau may be heard, and shall give them not less than ten days' written notice thereof. If the superintendent is advised by the rating bureau that it does not desire a hearing, he may, upon the consent of the applicant, waive the hearing. In considering the application for permission to file the deviation, the superintendent shall give consideration to the available statistics and the principles for rate making as provided in section 3935.03 of the Revised Code. The superintendent shall issue an order permitting the deviation for such insurer to be filed if he finds it is justified, and it shall thereupon become effective. He shall issue an order denying such application if he finds that the resulting premiums would be excessive, inadequate, or unfairly discriminatory. Each deviation permitted to be filed shall be effective until terminated

with the approval of the superintendent or as may otherwise be permitted or required by law.

3935.08 Appeal to superintendent from action of rating bureau

Any member of, or subscriber to, a rating bureau may appeal to the superintendent of insurance from the action of such rating bureau in approving or rejecting any proposed change in, or addition to, the filings of such rating bureau. The superintendent shall, after a hearing held upon not less than ten days' written notice to the appellant and to such rating bureau, issue an order approving the action of such rating organization or directing it to give further consideration to such proposal. If such appeal is from the action of the rating bureau in rejecting a proposed addition to its filings, the superintendent may, if he finds that such action was unreasonable, issue an order directing the rating organization to make an addition to its filings on behalf of its members and subscribers, in a manner consistent with his findings and within a reasonable time after the issuance of such order.

3935.09 Rate information furnished; right of review

Every rating bureau and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon the payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating bureau and every insurer which makes its own rates shall provide within this state reasonable means by which any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance af-

forded him. If the rating bureau or insurer fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating bureau or such insurer on such request may, within thirty days after written notice of such action, appeal to the superintendent of insurance, who, after a hearing held upon not less than ten days' written notice to the appellant and to such rating bureau or insurer, may affirm or reverse such action.

3935.10 Reporting loss and expense experience; interchange of data and co-operation with other states

The superintendent of insurance shall promulgate rules and statistical plans, reasonably adopted to each of the rating systems on file with him, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and country-wide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as is necessary to aid the superintendent in determining whether rating systems comply with the standards set forth in section 3935.03 of the Revised Code. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and which are not susceptible of determination by a prorating of country-wide expense experience. In promulgating such rules and plans, the superintendent shall give due consideration to the rating systems on file with him and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer need record or report its loss experience on a classification basis that is inconsistent

with the rating system filed by it. The superintendent may designate one or more rating bureaus or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the superintendent, to insurers and rating bureaus.

Reasonable rules and plans may be promulgated by the superintendent for the interchange of data necessary for the application of rating plans.

In order to further uniform administration of rate regulatory laws, the superintendent and every insurer and rating bureau may exchange information and experience data with insurance supervisory officials, insurers, and rating bureaus in other states and may consult with them with respect to rate making and the application of rating systems.

The superintendent may make reasonable rules and regulations necessary to effectuate sections 3935.01 to 3935.17, inclusive, of the Revised Code.

Sections 119.01 to 119.13, inclusive, of the Revised Code are applicable to the rule-making functions of the superintendent under sections 3935.01 to 3935.17, inclusive, of the Revised Code, including appeals from the order of the superintendent in adopting, amending, or rescinding rules.

* * * * *

REPLY BRIEF

RECORD AND BRIEFS

NOV 10 2011
OFFICE OF THE CLERK

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

November 10, 2011

Library of Congress
Law Library

12

CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their opening brief, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

ARGUMENT 3

I. THIS CASE DOES NOT RESEMBLE TRADITIONAL COMMON-LAW ACTIONS 3

A. Actions Against Fiduciaries Vindicate Concrete Interests 4

1. Actions Against Self-Dealing Trustees Provide Redress for Invasions of Property Interests 4

2. Actions Against Corrupt Agents Provide Redress for the Deprivation of Honest Services 6

3. Edwards Cannot Rely on a Relationship of Trust and Confidence 8

B. Edwards's Other Historical Arguments Also Fail 11

1. Presumed Damages Do Not Substitute a Showing of Injury 11

2. Unjust Enrichment Requires That the Defendant Be Enriched at the Plaintiff's Expense 12

3. Nominal Damages Was a Remedy Awarded To Protect Concrete Interests 13

4. Statutory Damages Do Not Substitute for a Concrete Injury..... 15

II. VIOLATION OF A STATUTORY DUTY OWED TO THE PLAINTIFF DOES NOT AUTOMATICALLY CONFER ARTICLE III STANDING..... 16

A. Standing Requires a Concrete, *De Facto* Injury 16

B. The Requirement of a *De Facto* Injury Protects the Judicial Function 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

Page

CASES

Allen v. Wright, 468 U.S. 737 (1984) 1

Carey v. Piphus, 435 U.S. 247 (1978) 15

Davoue v. Fanning, 2 Johns. Ch. 252 (N.Y. Ch. 1816) 5

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) 19

Goss v. Lopez, 419 U.S. 565 (1975) 15

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 18, 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 12, 16

Magruder v. Drury, 235 U.S. 106 (1914) 8

Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299 (1986) 11

Michoud v. Girod, 45 U.S. (4 How.) 503 (1846) 4, 5

Skilling v. United States, 130 S. Ct. 2896 (2010) 7

Sprint Communications Co. v. APCC Servs., Inc., 554 U.S. 269 (2008) 3

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 20, 21

Stone v. White, 301 U.S. 532 (1937) 12

Summers v. Earth Island Inst., 555 U.S. 488 (2009) 5

United States v. Carter, 217 U.S. 286 (1910) 6, 7, 8, 9

Utah Animal Rights Coal. v. Salt Lake City Corp., 371 F.3d 1248 (10th Cir. 2004) 14

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 21-22

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 3, 5, 15, 21, 22

Warth v. Seldin, 422 U.S. 490 (1975) 17

Webb v. Portland Mfg. Co., 29 F. Cas. 506 (C.C.D. Me. 1838) (No. 17,322) 14

Whelpdale v. Cookson, 28 Eng. Rep. 440 (Ch. 1747) 5

Woods v. City Nat'l Bank & Trust Co. of Chicago, 312 U.S. 262 (1941) 4

CONSTITUTION AND STATUTES

U.S. Const.:

Art. II 20

Art. III 1, 2, 3, 6, 12, 16, 19, 20, 21, 22

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724, codified as amended at 12 U.S.C. §§ 2601-2617 ..... *passim*

15 U.S.C. § 1681c(g) 20

15 U.S.C. § 1681c-1(a)(2) 20

42 U.S.C. § 3604(d) (1982) 18

LEGISLATIVE MATERIALS

H.R. Rep. No. 97-532 (1982) 10

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency, 92d Cong. (1972)..... 10

Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcomm. on Housing & Urban Dev. of the H. Comm. on Banking, Finance & Urban Affairs, 97th Cong. (1981) 10

OTHER MATERIALS

2 Dan B. Dobbs, *Law of Remedies* (2d ed. 1993)..... 7

Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927 (2001)..... 5

Restatement (First) of Restitution (1937)..... 13

Restatement (Third) of Restitution and Unjust Enrichment (2011)..... 13

Edwards has alleged no "personal injury fairly traceable to the . . . allegedly unlawful conduct" identified in her complaint. *Allen v. Wright*, 468 U.S. 737, 751 (1984). She has alleged no economic harm in the form of excessive charges or poor service or of any other kind; she has alleged no physical, emotional, psychological, reputational, or dignitary injury; she has alleged no deprivation of property; she has alleged no denial of the opportunity to participate in the political process.

Edwards argues, instead, that she need not allege any such adverse effect because (1) historically, no allegation of actual injury beyond the violation of a duty owed to the plaintiff was required for a claim like hers; and (2) irrespective of history, Congress has the power to define the violation of a statutory duty owed to the plaintiff as an injury *per se*. Those arguments provide no basis to expand the jurisdiction of Article III courts beyond its traditional limit of redressing claims by plaintiffs who have suffered or are threatened by an injury-in-fact.

First, the common-law cases Edwards cites provide no support for her claim that the violation of RESPA's conduct-governing duty establishes injury in the absence of any invasion of antecedent interests the duty protects. Where a trust beneficiary seeks redress for a trustee's self-interested dealings with trust property, or a principal seeks redress for an agent's breach of the duty of loyalty, the law provides a remedy for the invasion of concrete interests rooted in established property and contract rights. Edwards does not seek to vindicate any personal interest independent of the alleged statutory duty. Moreover, even if the betrayal of a relationship of trust could alone provide the requisite injury, RESPA's obliga-

tion to provide "services free from kickbacks" (Resp. Br. 1) was not, in this case, based on any special relationship of trust that affected, or could have affected, Edwards personally.

Second, Article III is not satisfied merely by "limiting [a] right of action to persons having a sufficient nexus to [a statutory] violation to be reasonably regarded as its victims." U.S. Br. 27. Instead, Article III requires a district court to satisfy itself that the plaintiff has alleged the constitutionally required injury-in-fact, which means, at a minimum, some adverse effect on the plaintiff. Congress can define legal rights and thus give legal recognition to injuries that go beyond any that would have been recognized at common law. RESPA itself does so. But, if a "nexus" to a statutory violation satisfies Article III's injury requirement, that requirement disappears in statutory litigation between private parties. That result is inconsistent with this Court's decisions, which have never recognized the existence of a statutory *violation* as constituting *injury* without more. Edwards's failure to allege any adverse effect on herself – indeed, her careful avoidance of any claim of individualized harm, the better to certify a class – means that she has no standing to invoke the remedial power of the courts.

ARGUMENT

I. THIS CASE DOES NOT RESEMBLE TRADITIONAL COMMON-LAW ACTIONS

Edwards, supported by groups of law professors,[1] argues that the breach of certain conduct-governing duties – in particular, fiduciary duties of loyalty – gives rise to a *de facto* injury even in the absence of any consequential harm from the breach. Resp. Br. 16, 18-31. But common-law remedies for self-dealing and breaches of duties of loyalty do not exist in the abstract; rather, they are available to provide redress when the violation of a duty leads to an invasion of concrete proprietary or economic interests. Moreover, even if the common law permitted a plaintiff to sue for the betrayal of a duty of loyalty in the absence of any other claim of injury, RESPA creates no such duty of loyalty, and Edwards alleged no such betrayal.[2]

---

[1] *See* Restatement Reporter & Advisers Br.; Trust Law & ERISA Law Professors Br.

[2] Edwards errs in describing the role history has played in this Court's Article III precedents. When this Court has found history "well nigh conclusive" on the question of Article III standing, *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000), it has relied on history *not* to supplant the requirement that a plaintiff identify an injury-in-fact, but for insight into when a plaintiff may pursue redress for *another's* (undisputed) injury. *See id.* at 771, 773, 777-78; *Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008).

A. Actions Against Fiduciaries Vindicate Concrete Interests

1. Actions Against Self-Dealing Trustees Provide Redress for Invasions of Property Interests

An action by a trust beneficiary against a trustee who has engaged in self-dealing with trust property represents an ordinary case where a defendant's violation of a duty owed to the plaintiff has caused harm to a concrete proprietary interest for which that plaintiff seeks redress. For example, in *Michoud v. Girod*, 45 U.S. (4 How.) 503 (1846), this Court "set[ ] aside . . . purchases by which [a pair of executors] became the possessors of their testator's entire estate." *Id.* at 552. In so doing, the Court applied the equitable "doctrine . . . of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another." *Id.* at 554. There, and in many other cases and authorities Edwards cites,[3] the key point is that, when a trustee or selling agent sells property to itself, the beneficiary or the principal may bring a suit to unwind the sale or recover any profits earned by the fiduciary, and the defendant cannot avoid that remedy by arguing that the terms of sale were fair or reasonable.

---

[3] Challenges to sales, leases, and loans of property in which the plaintiff had an equitable or beneficial interest account for the vast majority of the historical cases Edwards cites at pages 21-25 and in notes 4-5. *Woods v. City National Bank & Trust Co. of Chicago*, 312 U.S. 262, 263-64 (1941), one of the few exceptions, involved a dispute over payment of a trustee's expenses out of a bankruptcy estate, which certainly implicates the estate's concrete interest.

That principle does not support Edwards's claim that the law recognized an action for breach of a duty in the absence of injury. To the contrary, the aggrieved beneficiaries in *Michoud* and similar cases were protecting substantive legal entitlements – rights to particular property or other concrete economic assets. *See, e.g.*, *Davoue v. Fanning*, 2 Johns. Ch. 252, 256 (N.Y. Ch. 1816) (discussing plaintiff's "interest . . . that the property should be sold to the best advantage" so as to increase "the dividend of the residuary estate"). Because the trustees' judgment in disposing of trust property had not been impartial, the courts gave the beneficiaries "the choice . . . to judge for themselves whether they w[ould] take back the property." *Whelpdale v. Cookson*, 28 Eng. Rep. 440, 441 (Ch. 1747).[4] The remedy thus redressed an injury to an underlying substantive entitlement that was no mere "'byproduct' of the suit itself," *Vermont Agency*, 529 U.S. at 773; neither the duty nor the remedy existed "*in vacuo*," *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

The allegation that defendants' conduct caused harm to any underlying interest that RESPA protects is missing from Edwards's complaint. RESPA *does* protect (at a minimum) pecuniary interests, and, when those interests are invaded, a plaintiff would have standing to sue. For example, RESPA protects homebuyers against excessive charges for

---

[4] This rule was, moreover, consistent with the longstanding principle that a property right conveys "an entitlement that another person cannot exploit without the owner's consent." Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1934 (2001). Because a conflicted trustee does not have valid consent, requiring the trustee to return the property or give up any profits could "be justified . . . as an aspect of the [property] entitlement itself." *Id.*

settlement services: the economic loss entailed by such charges, if causally related to a violation, would constitute injury. But, as this case demonstrates, economic injury is not inherent in the alleged violation. Edwards has alleged none and has not undertaken to prove any. *See* Resp. Br. 35 (arguing that the "purported absence of economic harm . . . is irrelevant").

Edwards argues that it is "sufficient that she suffered an invasion of a right *designed to* protect her concrete interests." *Id.* at 34 (emphasis added); *see id.* at 41. But the common law did not provide a remedy for the violation of a right "designed" to protect a concrete interest, but for an actual invasion of concrete interests. Such an invasion – which is necessary and sufficient to create an injury for Article III purposes – is lacking here.

2. Actions Against Corrupt Agents Provide Redress for the Deprivation of Honest Services

Similarly, where a principal sues to recover compensation paid to (or the ill-gotten gain received by) a corrupt agent, the harm suffered is the deprivation of the bargained-for services of the agent, and often also the misappropriation of an opportunity that belonged to the principal. Thus, in *United States v. Carter*, 217 U.S. 286 (1910), the government sued an army captain who had used "discretionary powers" to help certain military contractors "realize[]" an "abnormal profit . . . of which, approximately, $500,000 ultimately found its way into his possession." *Id.* at 310. From those facts it is hard to escape "the conclusion that the government had been defrauded, and had suffered great loss." *Id.* at 300 (describing lower-court findings).

Edwards relies on this Court's statement that a showing of a separate loss from Carter's fraud was not necessary for the government to recover. *See id.* at 305-06; Resp. Br. 26. As in the case of a self-dealing trustee, however, that is because the harm to a conventional economic interest – that is, the right to services that the plaintiff paid for – is present irrespective of the existence of further consequential harms. *See Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (describing honest-services fraud as a "fraudulent scheme[] to deprive another of honest services through bribes or kickbacks supplied by a third party").

Edwards argues that she stands in a position comparable to a principal who has been deprived of the conflict-free services she "paid for." Resp. Br. 33 n.6. That injury *could* be present in a RESPA case – for example, an attorney or broker may be a fiduciary who receives compensation and owes honest services in return. But the facts alleged here present no similar harm. Tower City was acting as the agent of the title insurance underwriter, not Edwards's agent. *See* Pet'r Br. 6. Because Edwards did not pay Tower City to act on her behalf in that transaction, Edwards suffered no deprivation when Tower City acted as First American's agent, not hers.

Furthermore, where an agent receives a bribe or kickback with respect to a particular transaction, the principal may allege the harm of not obtaining the best possible terms – which likely could have been made better at least by the amount of the bribe. *See* 2 Dan B. Dobbs, *Law of Remedies* 698 (2d ed. 1993) ("[I]f the seller of goods to the employer would kick-back a percentage to the disloyal purchasing agent, it would presumably also discount the price to the

employer directly."). Here, by contrast, no comparable harm can be alleged, because Edwards paid the state-authorized rate for her First American policy, which was the only rate available. Tower City, unlike a disloyal fiduciary, was entitled to compensation from First American for the services it provided. In short, Edwards offers no allegation or anything other than speculation that the challenged payment by First American to its agent caused her to pay more for title insurance. *See* Pet'r Br. 27-29.[5]

3. Edwards Cannot Rely on a Relationship of Trust and Confidence

Edwards's reliance on historical analogies fails for the additional reason that the cases she cites are grounded in the special duty of trust and confidence inherent in the relationship between, for example, a trustee and a trust beneficiary or an agent and principal. *See, e.g.*, *Magruder v. Drury*, 235 U.S. 106, 120 (1914) ("It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself."); *Carter*, 217 U.S. at 306 ("The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied."). That kind of relationship does not exist here, either by virtue of the underlying state-law relationship between Edwards and Tower City or by virtue of RESPA itself.

---

[5] Edwards objects to the characterization of price inflation as "speculative," saying that "it is no different from arguments routinely made in antitrust cases." Resp. Br. 37. But antitrust plaintiffs must allege and prove market effects and injury to themselves; Edwards argues (and the Ninth Circuit held) that she need not do either.

Edwards does not say that Tower City was her fiduciary under state law or otherwise was in a special relationship of trust and confidence with her with respect to her title insurance transaction. To the contrary, Edwards effectively concedes (at 9) Tower City could have been acting as a fiduciary only in its possible capacity as escrow agent for the homebuyer. And she concedes RESPA does not create a fiduciary relationship. *See id.* at 31 (describing RESPA's prohibition as a "more modest duty" than an actual fiduciary duty).

Edwards argues (*id.*) that, because Congress *could* create a fiduciary relationship, it may also impose a lesser kickback-avoidance duty on settlement-service providers. But the issue is not whether Congress could require all settlement-service providers to avoid referral fees. Rather, the question is whether the violation of such a duty (which we assume existed here) *entails* a cognizable injury to any consumer whose transaction has a connection to the allegedly prohibited conduct. Even if the common law recognized an intangible injury caused by "betrayal of . . . trust" and "breach of confidence," *Carter*, 217 U.S. at 306 – rather than tangible injury to underlying economic interests – the required relationship is absent here.

Edwards relies on legislative history for the proposition that "homebuyers trust real estate professionals," so that, "[w]hether or not the professionals are fiduciaries under state law, homebuyers generally 'perceive or assume [them] to be in a fiduciary relationship.'" Resp. Br. 27 (emphasis omitted; second alteration in original). The legislative history provides no support for the claim that title insurance buyers consider *title insurance agents* to be their

fiduciaries. Nor could they reasonably do so, when the title insurance agents are acting as the agent of the underwriter. Edwards relies instead on portions of the legislative history discussing homebuyers' relationships with their real estate brokers and attorneys, individuals who may owe their clients some duty of loyalty and who may have actual relationships of trust with them.[6]

This Court need not consider whether betrayal in an actual relationship of trust might support standing without out-of-pocket pecuniary injury – for example, because of some emotional or psychological impact on the plaintiff. No such relationship existed here, and Edwards has not alleged that she suffered

---

[6] *See, e.g., Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 92d Cong. 2 (1972) (Washington Post article) (addressing referrals by "developers, lenders, real estate brokers, and builders"); *id.* at 21-22 (testimony of HUD Secretary) (addressing referrals to title companies by "attorneys, brokers, and lenders"), 738-39 (1972 HUD-VA report) (home buyer "usually depends upon advice of the [real estate] broker, escrow agent, seller, or settlement attorney"); *Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcomm. on Housing & Urban Dev. of the H. Comm. on Banking, Finance & Urban Affairs*, 97th Cong. 152-53 (1981) (testimony of ALTA President) (expressing concerns about "real estate brokers, mortgage lenders, builders, and attorneys" that "have become title insurance agents or have established, acquired, or purchased stock in title insurance agencies"); *id.* at 247-48 (1977 DOJ report) (expressing concern about real estate brokers owning title companies); H.R. Rep. No. 97-532, at 53 (1982) (referring to "four categories of persons who are in a position to refer the settlement business of consumers in residential real estate transactions – real estate brokers and agents, mortgage lenders, real estate builders and developers, and attorneys").

such impact. To the contrary, Edwards has avoided any such individualized allegation altogether: her apparent concern is not with her own claim but instead with her ability to represent a large class.[7]

B. Edwards's Other Historical Arguments Also Fail

Edwards offers a variety of other analogies to support her pursuit of a monetary recovery for conduct that made her no worse off. None establishes that Edwards's case should be able to proceed in the absence of *de facto* injury to herself.

1. Presumed Damages Do Not Substitute for a Showing of Injury

Edwards argues (at 47-49) that "RESPA closely tracks the longstanding remedy of presumed damages." *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the principal case on which she relies, shows why that is not so. As *Stachura* explains, the purpose of presumed damages is "roughly [to] approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311. That is, the remedy presupposes the existence of *harm*, which Edwards has not alleged. A RESPA plaintiff might suffer a difficult-to-measure harm, such as "low quality or substandard title insurance services." NAILTA Br. 5. In such a case, RESPA's statutory damages would relieve that plaintiff of the burden of quantification. But, here, Edwards's alleged harm is not

---

[7] Discussing Edwards's subjective concerns about this case is, of course, a mere figure of speech. Edwards – the actual person – testified (in another proceeding) that she believed that the lawyers who recruited her had found another class representative and that she did not know whether the case was proceeding. *See* Dist. Ct. Docket 253-1, at 9 (citing testimony).

hard to quantify; it is non-existent. And none of the cases Edwards cites suggests that Article III permits injury-in-fact to be presumed rather than proved "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

2. Unjust Enrichment Requires That the Defendant Be Enriched at the Plaintiff's Expense

Edwards argues (at 49-50) that her claim is further supported by "principles of unjust enrichment." But the unjust enrichment long recognized by courts is "unjust enrichment by the defendant *at the expense of the plaintiff*," *Stone v. White*, 301 U.S. 532, 534 (1937) (emphasis added). While that need not entail any loss to the plaintiff in the sense that the transaction put the plaintiff in a worse position than she was beforehand, it does entail putting the plaintiff in a worse position than if the wrong had not been committed – which is also injury (if not "loss"). All the cases thus involve harm to the plaintiff in the conventional sense that the plaintiff is deprived of compensation for a benefit conferred (as in cases of quasi contract) or because the defendant's conduct has invaded the plaintiff's substantive interest (as in the cases Edwards cites involving invasion of property interests by trespassers, infringers, and

self-dealing trustees).[8] Edwards alleges no such invasion.[9]

3. Nominal Damages Was a Remedy Awarded To Protect Concrete Interests

Edwards argues (at 44) that the historical availability of suits for nominal damages supports her position that "a violation of personal legal rights,

---

[8] Edwards cites the Restatement (First) of Restitution §§ 138(2), 197 & comment c (1937), which address the same type of breach of fiduciary duty discussed in Part I of Edwards's brief and above at pages 4-8. In that circumstance, restitution is simply a remedy available to redress the invasion of the underlying property interest.

[9] *Amici* Reporter & Advisers suggest that common-law unjust enrichment has broader scope, but their argument is undermined because it depends on statements from the recent Third Restatement (published this year) that represent important changes from the First Restatement (which itself was a self-conscious innovation). For example, they quote Third Restatement § 3 – "'A person is not permitted to profit by his own wrong'" – and claim that § 3 "closely track[s] its predecessors." Reporter & Advisers Br. 5. But First Restatement § 3 reads: "A person is not permitted to profit by his own wrong *at the expense of another*." (Emphasis added.) And, indeed, comment a to First Restatement § 3 explained that this principle refers to "cases [in which] a person who receives property as the result of a tort committed by him against another has a duty of compensating the other *for the loss suffered*, at least to the extent of the benefit received." (Emphasis added.)

Amici further assert that "'"at the expense of another" can also mean "in violation of the other's legally protected rights,"'" Reporter & Advisers Br. 5 (quoting Third Restatement § 1 cmt. a), without noting that this language, too, is new, and without explaining in what circumstances such a violation would be sufficient (which rights?) and without asserting (much less showing) that a plaintiff can make a claim in such circumstances without showing that she was placed in a worse position than she would otherwise have enjoyed by virtue of the violation or the benefit conferred.

with no other ensuing harm, is sufficient to permit a suit." This mistakes the function of nominal damages, which "serve essentially the same function as declaratory judgments" and were "originally . . . a means of obtaining declaratory relief before passage of declaratory judgment statutes." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring). Thus, the purpose of nominal damages was not to take up judicial resources with suits where there had been no harm to the plaintiff in the past and would be none in the future. It was instead "to obtain an authoritative judicial determination of the parties' legal rights" in a context where that determination resolved a live controversy and had real value to the parties, such as a trespass suit between "neighboring landowners" that settled a "disputed boundary" by the award of a dollar, or a libel suit that allowed a plaintiff to vindicate her reputation by proving that "the supposed libel was a falsehood." *Id.* at 1264.

Webb v. Portland Manufacturing Co., 29 F. Cas. 506 (C.C.D. Me. 1838) (No. 17,322), on which Edwards relies, makes this function of a nominal-damages award clear. There, the dispute concerned water rights: the defendants had drawn off water above the dam at which the plaintiff owned a mill, but not so much as to cause any actual damages. *See id.* at 507. In holding that the plaintiff could sue, Justice Story found it "most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common." *Id.* at 509. Thus, the plaintiff's ability to sue was grounded not only in a common-law property

interest, but a threat to that interest that required judicial clarification for its protection.[10] Edwards's attempt to liken her pursuit of a statutory bounty to the use of nominal-damages awards to obtain needed clarification of legal rights in no way strengthens her case.

4. Statutory Damages Do Not Substitute for a Concrete Injury

Edwards also argues (at 46) that "[c]ourts have also long vindicated invasions of legal rights through statutory damages." But, as this Court explained in *Vermont Agency*, the mere availability of a statutory "bounty" will not support standing if the monetary recovery authorized by statute is "unrelated to injury in fact." 529 U.S. at 772. Accordingly, a plaintiff may invoke federal jurisdiction to recover statutory damages only if those damages serve as "compensation for" (*id.*) the alleged violation of that plaintiff's rights. Otherwise, the federal courts lack jurisdiction to award them. *See* Pet'r Br. 24-25; *see also infra* pp. 19-20.

---

[10] *Carey v. Piphus*, 435 U.S. 247 (1978), awarded nominal damages for a procedural due process violation after denying compensatory damages that had been sought through the pendency of the litigation. *See id.* at 266. The plaintiffs were students who had been suspended without appropriate procedural protections. Their standing was clear because they had been deprived of a property interest under *Goss v. Lopez*, 419 U.S. 565 (1975). *See Carey*, 435 U.S. at 249 n.1 (citing *Goss*).

II. VIOLATION OF A STATUTORY DUTY OWED TO THE PLAINTIFF DOES NOT AUTOMATICALLY CONFER ARTICLE III STANDING

Edwards's mistaken reliance on history aside, she argues that a plaintiff need not allege any "*de facto* injur[y]," *Lujan*, 504 U.S. at 578, because Congress's power to "define" injuries by establishing statutory rights, *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment), entails the power to confer standing in the absence of injury-in-fact – which is what *de facto* injury means. To adopt that misreading of the *Lujan* concurrence would ignore this Court's clear and repeated statements that Article III standing requires an injury *in fact*, not a fictitious injury. It also would represent the first time that this Court has permitted a case to proceed – whether against the government or a private party – in the absence of a *de facto* injury. The Court should decline Edwards's invitation.

A. Standing Requires a Concrete, *De Facto* Injury

1. As this Court recognized in *Lujan*, Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S. at 578. RESPA itself does so: before RESPA, the allegation that, as a result of a referral, an individual paid more for a particular settlement service than the price available from some other provider would not, in general, have stated any legally cognizable injury. No court could have granted relief on that basis: it would have been like an allegation that one paid "too much" for a pair of shoes because they were available for less at another shoe store across town. After RESPA,

a price difference *does* create a legally cognizable injury if the larger payment is the result of a now-prohibited referral. With RESPA, Congress thus exercised its power to "define" new injuries and related those injuries to a class of persons entitled to bring suit – that is, those subjected to a prohibited referral.

That principle does not help Edwards, however, because she has not alleged any *actual* settlement-service-related injury. Nor does she claim she has. Each time her brief refers to the alleged violation's purported effect on her personally, it does so with artfully crafted language. Did the payments of which she complains increase the amount she paid? No, but they would have "*tend[ed]* to increase" that amount. Resp. Br. 41, 44, 49 (emphasis added). Did they cause her to receive lower-quality services? No, but, again, "kickbacks *tend* to . . . impair quality," generally speaking. *Id.* at 49 (same). Was the transaction against her interests in any way? No, but there were "*incentives* to disregard *her* best interests." *Id.* at 42 (first emphasis added). None of this satisfies the "Article III requirement that remains" even after Congress authorizes a suit; Edwards has not "allege[d] a distinct and palpable injury to h[er]self." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

The government contends that, "*if* unlawful kickbacks are pervasive in a particular market, the standard rate *may* be inflated to reflect that systemic illegal practice." U.S. Br. 25 (emphases added). But no actual price inflation has been alleged here, and Edwards affirmatively disclaims (at 35-38) any intention to prove it. *See also supra* pp. 7-8. No one disputes that Congress has the authority to prohibit certain conduct that may, in particular cases, cause

no harm (or even bring benefits). But Congress does not have the power to authorize private suits in the absence of harm to the plaintiff.

2. Edwards can identify no case that permitted a plaintiff to substitute an allegation of statutory violation for an allegation of actual injury. Her claim (which the government supports) that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is such a case misreads *Havens*. *See* Resp. Br. 39-40; U.S. Br. 18-19.

The Court in *Havens* found standing based on an "injury to [a] statutorily created right to truthful housing information" in the context of a plaintiff who did not intend to buy or rent a home. 455 U.S. at 374. The type of violation at issue in *Havens* was a denial of truthful information and, moreover, a denial of information that – as the Court recognized[11] – *also* constituted discriminatory treatment on the basis of race, a well-recognized injury-in-fact. *See* Pet'r Br. 30-31. Accordingly, even if the tester plaintiff in *Havens* had no personal use for the information guaranteed by the statute, she still suffered the concrete injury of invidious, race-based discrimination.

The claim that Edwards was deprived of "taint-free" settlement services is not comparable to the deprivation suffered by the tester in *Havens*. That tester was entitled to truthful information, and she received false information on the basis of her race. That was not an injury *merely* because Congress said it was: rather, it was "injury in precisely the form

---

[11] *See* 455 U.S. at 374 (stating that "Congress [had] . . . banned *discriminatory* representations" in 42 U.S.C. § 3604(d) (1982)) (emphasis added); *id.* at 375 (explaining that only a "victim of a *discriminatory* misrepresentation" has a cause of action) (same).

the statute was intended to guard against," 455 U.S. at 373 – a *de facto* injury for which the statute provided a remedy. Because the requisite factual injury was plainly apparent from the record before the *Havens* Court, its decision did not and could not hold that such injury was not constitutionally required. Edwards, by contrast, alleges no difference *in fact* between the title insurance policy she received and to which she was entitled. Her complaint is not that First American's conduct had any bad effect on her, but simply that First American violated RESPA; her characterization of the services she received as "tainted" means *only* that. Because Article III requires more than a play on words to establish standing, Edwards has not met this Court's settled test.

3. The government gives examples of other statutes that, it claims, authorize "private suits . . . by classes of persons whom the proscribed conduct has a natural tendency to injure," without "requir[ing] proof that the feared tangible harms have actually materialized in a particular case." U.S. Br. 25-27; *see also* Resp. Br. 39-40 & n.10 (similar). None of the government's examples casts any doubt on the correct result here.

Some are statutes that provide damages for harms, such as copyright infringement, that are (unlike Edwards's claim) traditionally recognized as invasions of concrete property interests. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (explaining that copyright protection historically derived from the recognition that a copyrighted work "was as much the author's property as the material on which it was written"). Others provide damages for acts that are easy to classify as

injuries-in-fact, such as willfully refusing to provide "a free credit report as required by statute." U.S. Br. 26 (citing 15 U.S.C. § 1681c-1(a)(2)). A person who wants a free credit report and is refused one has suffered a tangible injury in a way that Edwards has not.

The government does offer examples where a private suit on the basis of a statutory violation without an additional showing of harm would be dubious, such as a suit for "printing a receipt with more than the last five digits of a credit card." *Id.* (citing 15 U.S.C. § 1681c(g)). It is not a defect in our position that it would require a court faced with a private action under § 1681c(g) to ask the plaintiff to show some actual injury. That requirement not only is mandated by Article III, but also would prevent the judicial system from being used as a tool for such abuses as a class action seeking "between $290 million and $2.9 billion" for incorrectly printed receipts with no showing of any harm done. Experian Br. 16 (giving this example and explaining that the "low end of [this damages range] was more than 600% of the . . . net worth" of the toy-seller defendant).

B. The Requirement of a *De Facto* Injury Protects the Judicial Function

The prohibition on suits by plaintiffs who have not suffered a factual injury is a rule of judicial restraint, important to ensuring that "[t]he courts . . . stay within their constitutionally prescribed sphere of action" "derive[d] from Article III and not Article II." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998). Accordingly, plaintiffs who lack standing cannot sue even though their suit could be harmonized with Article II's directive that the execu-

tive branch "take Care that the Laws be faithfully executed." *See id.*

That said, it is telling that Edwards's *amici* rely on assertions that this lawsuit is necessary not to vindicate the concrete interests of Edwards and her putative class, but to protect *all* purchasers of title insurance. Though Edwards's counsel protests that "RESPA is not a private attorney general statute," Resp. Br. 54, her *amici* disagree, arguing that "private enforcement" is "required to ensure compliance with RESPA[]," NAILTA Br. 38; that no-injury actions of this kind are the "means of enforcement chosen by Congress" for RESPA and other consumer-protection statutes, AARP Br. 19; and that the cause of action serves "Congress's goal of penalizing and deterring wrongdoers through strong enforcement," Lawyers' Committee Br. 22. Even the government argues that Edwards should be permitted to sue without showing harm to herself personally because violations of RESPA "cause substantial aggregate harm." U.S. Br. 25.

These arguments are based on the idea that Congress should have the power to calibrate private enforcement by adjusting the size of the bounty to be paid to successful plaintiffs. But neither a "generalized interest in deterrence," *Steel Co.*, 523 U.S. at 108-09, nor the possibility of recovery of a "bounty," *Vermont Agency*, 529 U.S. at 772, suffices to establish Article III standing. An appropriate respect for the "profound[] [e]ffect[s] [on] lives, liberty, and property" caused by "[t]he exercise of judicial power" requires that the courts demand a real "show[ing] [of] 'injury in fact'" before hearing actions based on generalities about deterrence. *Valley Forge Christian*

College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

Edwards insists that this case has nothing to do with the class-action context, but that is not so. Where an individual suffers harm as the result of unlawful private conduct, hardly anything is easier than pleading that injury. We may assume that there are some potential RESPA plaintiffs who could plead in good faith some dissatisfaction with the services of any given title insurer or agent. If Edwards had done so, and if she succeeded in proving her case, the statute authorizes a generous recovery, including attorneys' fees. But Edwards defends – must defend – the proposition that such individualized harm is unnecessary, because she cannot show such harm for each member of the massive class she seeks to certify. This is not a case about keeping the courthouse door open to plaintiffs who seek "compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73. It is, instead, about keeping a route open to a class-action windfall. The Court should not distort Article III for that purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

November 10, 2011

SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
MAY 31 2011
OFFICE OF THE CLERK

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

May 31, 2011

Library of Congress
Law Library

CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their petition for a writ of certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. THIS CASE PROVIDES A PROPER VEHICLE TO RESOLVE THE QUESTIONS PRESENTED 2

II. THE GOVERNMENT FAILS TO SQUARE THE NINTH CIRCUIT'S DECISION WITH THIS COURT'S STANDING JURISPRUDENCE OR THE STATUTE 6

III. THERE ARE CONFLICTS IN THE CIRCUITS ON THE QUESTIONS PRESENTED 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 10

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) 5

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 10

Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006) 6

Durr v. Intercounty Title Co., 14 F.3d 1183 (7th Cir. 1994) 10

FEC v. Akins, 524 U.S. 11 (1998) 7

FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) 3

Fidelity Fed. Bank & Trust v. Kehoe, 547 U.S. 1051 (2006) 5

Gollust v. Mendell, 501 U.S. 115 (1991) 1

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 7

Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992) 4

Kendall v. Employees Ret. Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 11

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988) 6

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 7, 8

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 5, 7, 8

Moore v. Radian Group, Inc.:

233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf 9

No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf ...7, 9, 10, 11

Raines v. Byrd, 521 U.S. 811 (1997) 8

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 3, 4

Tumey v. Ohio, 273 U.S. 510 (1927) 7

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 1, 4

Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590 (10th Cir. 1996) 11

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) 3

CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. III 1, 2, 3, 6, 7, 8, 11

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 11

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* 1, 2, 4, 5, 7, 9, 11

§ 2(a), 12 U.S.C. § 2601(a) 9

§ 5, 12 U.S.C. § 2604 7

§ 8(a), 12 U.S.C. § 2607(a) 7, 8, 10
§ 8(b), 12 U.S.C. § 2607(b) 10
§ 8(d), 12 U.S.C. § 2607(d) 8, 9
§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 10
§ 8(d)(2), 12 U.S.C. § 2607(d)(2) (1976) 10
Fed. R. Civ. P.:
Rule 23(a)(4) 6
Rule 23(f) 1, 3, 4

OTHER MATERIALS

Brief for Intervenor United States, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (No. 08-4334), 2009 WL 1576784 10
Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 4
7AA Charles A. Wright et al., *Federal Practice and Procedure* (3d ed. 2005) 6

The government defends (at 7) as "correct" the Ninth Circuit's judgment that RESPA confers standing on a plaintiff "who alleges a kickback . . . whether or not the kickback demonstrably affected the price or quality of the relevant settlement service" and that such a plaintiff "has sufficient injury-in-fact to sue in federal court." The government's argument leaves no doubt that this case squarely presents both the statutory and Article III standing issues, matters of surpassing importance to the constitutional and statutory scheme, to petitioners, and to the industry. Neither the fact that the standing issues were decided in the context of an appeal under Federal Rule of Civil Procedure 23(f), nor the fact that the appeal is interlocutory, diminishes the importance of deciding the threshold standing questions now. To the contrary, given the stakes in this class-action litigation, it is important to resolve the questions presented without delay.

The government fails to reconcile the result below with this Court's decisions interpreting Article III to require a plaintiff to establish a "distinct and palpable injury" – separate from the interest in collecting a monetary reward from the suit – to have standing. *Gollust*, 501 U.S. at 126; *see Vermont Agency*, 529 U.S. at 772-73. The government compares plaintiff's "ability to receive dispassionate settlement-service advice" to a litigant's interest in having an unbiased judge. Br. 12. Leaving aside that respondent never alleged a deprivation of "dispassionate advice," the government's need to stretch for such an inapposite analogy emphasizes the unprecedented extension of the judicial power that the Ninth Circuit authorized.

Particularly in light of the difficult constitutional issue that would otherwise arise, RESPA is properly

read to restrict standing to private parties who can allege a concrete injury. In any event, Article III requires that result. The circuits have divided on these questions (as the government has previously acknowledged) and the lower courts are in disarray. Further, these issues are not only recurring (the decision below has already been followed twice) but also critical to those subject to RESPA. The petition should be granted.

I. THIS CASE PROVIDES A PROPER VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

A. The government recognizes (at 18) that "Article III standing" "may be decided in a Rule 23(f) appeal." And it admits (at 5) that respondent's complaint contains no allegation that she "paid more for title insurance," or "received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback." The government thus agrees that this case cleanly presents the question whether a private party can establish constitutional standing without suffering any injury other than the alleged violation of a "statutory right" – as respondent already conceded. *See* Cert. Reply 1.

The government further acknowledges (at 18) that the Court can review the statutory-standing issue "to the extent that it is necessary to construe RESPA to determine respondent's Article III standing." There should therefore be no dispute that the first question presented is likewise properly before the Court, because the Ninth Circuit's conclusion on the constitutional question rested exclusively on its holding that respondent had standing to sue under RESPA. *See* App. 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has stand-

ing to pursue her claims against Defendants."). The Ninth Circuit implicitly, and correctly, recognized that respondent had alleged no *other* injury – apart from what she characterizes as the "invasion of an individual statutory right," Opp. 18 n.10 – that could satisfy the Article III actual-injury requirement.

The government asserts (at 19) that it is not "clear that statutory standing may be raised on a Rule 23(f) appeal," but provides no reason to doubt it. *Steel Co.*, which the government cites, supports petitioners: it stands for the proposition that statutory standing *can* be considered before Article III standing. *See* 523 U.S. at 92, 97 n.2; Pet. 24 n.16. The government offers no support for any argument that appeals under Rule 23(f) are an exception to that rule, and such an exception would not make sense. If a reviewing court were required to take as a given a lower court's ruling on statutory standing, it would be forced to address the constitutional standing question in circumstances where a constitutional ruling might be unnecessary – contrary to "a familiar principle of [this Court's] jurisprudence." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993); *see FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 489-90 (1985) ("In view of our conclusion that the [plaintiffs] lack standing under the statute, there is no need to reach the Art. III issue decided by the District Court."). Especially in a case like this one, where the constitutional issue hinges (in the lower court's view) on the statutory issue, consideration of the statutory question cannot and should not be deferred.

There is likewise no merit to the government's suggestion (at 18-19) that the first question concerns the scope of the statutory right of action rather than

an issue of statutory standing. The challenge to respondent's right to maintain her action does not rest on whether the challenged conduct (*i.e.*, the investment in the title agency) could support liability, a question that would go to the scope of the cause of action. *See Steel Co.*, 523 U.S. at 97 n.2 (explaining that questions involving the scope of the statutory cause of action involve the question "whether *any* plaintiff [asserting a particular legal theory] has a cause of action under the statute"). Rather, petitioners' challenge is based on "whether [the statute at issue] authorizes *this plaintiff* to sue." *Id.* at 92 (emphasis added). Whether RESPA authorizes suits by plaintiffs who lack any concrete injury is thus a matter of statutory standing. *See also Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment) (one "element of statutory standing" is whether "the plaintiff is within the class of persons sought to be benefited by the provision at issue").

B. The government also argues (at 17) that the "interlocutory posture" of this appeal weighs against review, but it fails to respond to our point that, because the petition raises threshold issues of standing, review is appropriate now (Pet. 30 n.21). This Court regularly grants review of interlocutory decisions, particularly when, as here, the questions presented involve issues of jurisdiction or other "important and clear-cut issue[s] of law that [are] fundamental to the further conduct of the case." Eugene Gressman et al., *Supreme Court Practice* 281-82 (9th ed. 2007); *see Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (argued Mar. 29, 2011) (Rule 23(f) appeal); *see also Vermont Agency*, 529 U.S. at 770.

The government notes (at 19) that petitioners have raised numerous defenses to respondent's claims, but given the massive liability threatened in this case, confronted with "even a small chance of a devastating loss," petitioners will face "pressure[]" to compromise even "questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see* Pet. 31. Thus, the government's speculation (at 17-18) that this case may be resolved "on other grounds" does not justify denying the petition given the substantial questions about respondent's standing to maintain this suit. The existence in this case of "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

The government also speculates (at 19-20) that, "if the litigation is allowed to proceed," respondent "may" allege some injury from the claimed RESPA violation. That (merely theoretical) possibility is beside the point: respondent bases her standing to sue exclusively on the alleged violation of a statutory right (*see* Opp. 18 n.10); in the absence of any allegation or evidence of injury, the case cannot proceed. *See Lujan*, 504 U.S. at 561.* Moreover, in light of the Ninth Circuit's holding, respondent has no reason to show that the alleged RESPA violation caused her an actual injury.

On the other hand, if this Court grants review and reaffirms that a plaintiff such as respondent must allege (and prove) an actual injury to have standing,

---

* The deadline for amending the pleadings has passed. *See* Joint Rule 26(f) Report at 10 (Oct. 25, 2010) (DN 172).

that determination will have a profound impact on the litigation even if one assumes that this plaintiff could succeed in demonstrating injury. In a class action, "the court must be able to find that both the class and the representatives have suffered some injury" sufficient to confer standing. 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1785.1, at 390 (3d ed. 2005); *see Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."). The need for both respondent and the class members to demonstrate an actual injury distinct from the statutory violation – as well as respondent's obligation to show that her claim is representative of the claims of the class, *see* Fed. R. Civ. P. 23(a)(4) – would call into question the propriety of class-wide adjudication of this case.

II. THE GOVERNMENT FAILS TO SQUARE THE NINTH CIRCUIT'S DECISION WITH THIS COURT'S STANDING JURISPRUDENCE OR THE STATUTE

A. For the critical proposition that Article III standing can be based on the "taint" of a statutory violation, the government cites (at 12) not cases interpreting Article III but cases holding that an appellate court can remedy a district judge's erroneous refusal to recuse without having to determine whether the judge's conflict of interest actually affected the result. Those decisions apply a commonsense principle that, *in a case in which jurisdiction exists under Article III*, an appellate court can order a new trial before an impartial judge. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988) (remedy of new trial appropriate when statutory violation "create[d] precisely the kind of appear-

ance of impropriety that [the statute] was intended to prevent"); *Tumey v. Ohio*, 273 U.S. 510, 523, 535 (1927) (it "deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case"). That says nothing about whether Article III jurisdiction can be based on a claimed statutory violation that causes no demonstrable harm. That the government must stretch to draw this analogy is powerful evidence that the Ninth Circuit's standing determination represents an expansion of judicial power beyond anything that has been recognized by this Court.

None of the other cases cited by the government authorized standing based on a statutory violation that caused no actual injury. In relying (at 11) on *Havens* and *Akins*, the government neither acknowledges nor disputes our showing that the plaintiffs in those cases alleged actual injuries resulting from the statutory violations. *See* Pet. 27-28 & n.18. Nor does the government contest our explanation that those cases are inapposite, both because § 8(a) (unlike other sections of RESPA, *see, e.g.*, 12 U.S.C. § 2604) is not a disclosure provision (*see Moore*, 5th Cir. Op. 11-12) and because respondent has abandoned any claim that she was denied statutorily required information about the cost of title insurance. *See* Pet. 7, 22 & n.15, 28 n.18.

The government quotes (at 10) the dictum from *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), that "Congress may enact statutes creating legal rights, the invasion of which creates standing." *Id.* at 617 n.3. But, as the Court explained in *Lujan*, the *Linda*

R.S. dictum refers to statutes in which Congress "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S. at 578. Nothing in *Linda R.S.* (or any of this Court's other cases) supports the Ninth Circuit's radical holding that Congress can manufacture Article III standing simply by creating a statutory right and a cause of action to enforce it. Instead, this Court has held that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue." *Raines*, 521 U.S. at 820 n.3; *see* Pet. 26-27.

None of this is to say that an injury must be "economic in nature" to confer standing. Gov't Br. 11. But respondent does not allege that she suffered even a non-economic injury, besides the asserted "invasion of an individual statutory right." Opp. 18 n.10. The government's observation (at 12-13) that respondent "made a monetary outlay" for title insurance does not establish an injury in fact. Respondent received a service (title insurance) in return for that "monetary outlay." In light of the concession that she neither was overcharged nor received deficient services, there is no basis for characterizing the payment of a state-regulated premium in return for services as an "injury."

B. On the statutory question, the government asserts (at 8-9) that § 8(a) requires a "nexus" between a prohibited payment and a settlement service, and it points to the appearance of the definite article in § 8(d). From that, it infers that, for every violation of § 8(a), there must be a private plaintiff entitled to demand treble damages under § 8(d). But that inference is unsound. A "kickback" violates § 8(a) when it is given "pursuant to an[] agreement" that

"business incident to or a part of a real estate settlement service . . . shall be referred to a[] person." Such an agreement to refer settlement-service business can exist even if no particular settlement service is ever actually referred. The critical statutory phrase – "involved in the violation" – appears only in § 8(d), and it requires a private plaintiff seeking to recover treble damages to show that the alleged referral agreement had a concrete effect on her particular settlement-service transaction. *See Moore*, 5th Cir. Op. 8, 10; *Moore*, 233 F. Supp. 2d at 826.

Reading RESPA to require that the alleged statutory violation have affected the terms of the settlement transaction accords with the Act's purpose of preventing and remedying "unnecessarily high" settlement charges. 12 U.S.C. § 2601(a). That interpretation reconciles the provision with an underlying principle of constitutional standing – the requirement of an injury in fact – of which Congress is expected to have been aware. And it properly avoids the grave constitutional concerns raised by the government's contrary construction. The government rightly does not argue that private actions are necessary to enforce the law; federal and state regulators can do so without establishing harm to a private party. *See* Pet. 23.

It does not help the government to assert (at 9-10) that other sections of RESPA contain different measures of damages, allowing recovery of "actual damages," rather than triple the charges paid. The availability of a particular type of damages for plaintiffs *who have standing* does not answer the question of *which* plaintiffs have standing. *See* Pet. 24-25.

Nor do the 1983 amendments to RESPA, on which the government relies (at 10), support its inter-

pretation of § 8(d)(2). Originally, § 8(d)(2) contained separate clauses addressing suits for violations of § 8(a) (the kickback provision allegedly violated here) and § 8(b) (which prohibits certain fee-splitting arrangements). *See* 12 U.S.C. § 2607(d)(2) (1976). The 1983 amendments consolidated those clauses and eliminated the original version's reference to recovery of three times "the value or amount of the fee or thing of value" paid, *id.* – language that would have made no sense as applied to § 8(b). The government identifies nothing in the legislative history of the 1983 amendments (and we are not aware of anything) suggesting that Congress intended to change the meaning of § 8(d)(2) to authorize uninjured plaintiffs to sue.

III. THERE ARE CONFLICTS IN THE CIRCUITS ON THE QUESTIONS PRESENTED

Like respondent, the government claims (at 13) that *Durr* is "inapposite," but it previously represented to the Third Circuit that *Durr* was part of a "line of cases" that had "reached the opposite conclusion" from *Carter*. Brief for Intervenor U.S. at 12, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (No. 08-4334). There, the government recognized that, "in *Durr*, both the district court and the court of appeals" took the position that "damages under section 8(d)(2) are limited to three times the amount *of the overcharge*." *Id.* at 13 (citation omitted; emphasis added). The government was correct in *Alston* that *Durr* cannot be squared with the decision below. *See* Pet. 11-14; Cert. Reply 4.

The government also questions (at 15) the precedential weight of *Moore* – as did respondent – even as it admits (at 15 n.11) that the only court in the Fifth Circuit to consider the issue since *Moore* followed

that case. Cert. Reply 3. Although the government also suggests that *Moore* is off point, the Fifth Circuit squarely held that RESPA's "language" and "history" demonstrate that a private party "cannot establish standing simply by alleging a violation of the language of § 2607(a)." 5th Cir. Op. 13.

The government seeks (at 15-17) to distinguish *Kendall* and *Wilson* on the ground that they involved statutes other than RESPA. But the government makes no effort to explain why the fact that *Kendall* involved ERISA renders inapposite the Second Circuit's conclusion that some actual injury beyond the mere claim of a statutory violation is necessary for standing under Article III. Cert. Reply 5-6. Similarly, the government fails to explain how the plaintiff's receipt of discriminatory advertising in *Wilson* is more "abstract or generalized" (Br. 17) than the claim here. Respondent, on behalf of herself and a class of participants in more than a million transactions, seeks to recover three times the amount she paid for title insurance, based on an alleged violation that had no demonstrable effect on, and occurred eight years before, her transaction. *Wilson* is no different from this case; in both, the plaintiffs alleged that they had experienced a statutory violation. The Tenth Circuit held that such an allegation did not satisfy Article III's actual-injury requirement, whereas the Ninth Circuit reached the opposite (and incorrect) decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

May 31, 2011

AMICUS CURIAE BRIEF

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

WILLIAM M. JAY
Assistant to the Solicitor General

MICHAEL JAY SINGER
CHRISTINE N. KOHL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HELEN R. KANOVSKY
General Counsel
Department of Housing and Urban Development
Washington, D.C. 20410

QUESTIONS PRESENTED

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits the payment of kickbacks in exchange for referrals of "business incident to or a part of a [covered] real estate settlement service." 12 U.S.C. 2607(a). Any person who pays or receives a kickback in violation of Section 2607(a) is liable "to the person or persons charged for the settlement service involved in the violation" for statutory damages "in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The questions presented are as follows:

1. Whether RESPA requires the plaintiff in a private damages action to allege that an unlawful kickback concretely affected the price, quality, or other characteristics of the relevant settlement service.

2. Whether a plaintiff who paid for a settlement service, after being unlawfully referred to the service provider in exchange for a prohibited kickback, has established a sufficient injury-in-fact to have standing to sue in federal court under Article III of the Constitution.

TABLE OF CONTENTS

Page

Statement 1
Discussion 7
A. The decision of the court of appeals is correct 8
B. This case does not present a circuit conflict warranting this Court's review 13
C. This case is an unsuitable vehicle for resolution of the questions presented because the case is currently in an interlocutory posture and the Ninth Circuit's jurisdiction rested on respondent's appeal from the denial of class certification ... 17
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Alston v. *Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) 7, 8, 9, 13
Carter v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009) 7, 9, 13
Durr v. *Intercounty Title Co.*, 14 F.3d 1183 (7th Cir.), cert. denied, 513 U.S. 811 (1994) 14
Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) .. 11
Hardin v. *Kentucky Utils. Co.*, 390 U.S. 1 (1968) 11
FEC v. *Akins*, 524 U.S. 11 (1998) 11
Kendall v. *Employees Retirement Plan of Avon Prods.*, 561 F.3d 112 (2d Cir. 2009) 16
Liljeberg v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) 12
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 10
Lorazepam & Clorazepate Antitrust Litig., In re, 289 F.3d 98 (D.C. Cir. 2002) 18

Cases—Continued: Page

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 11, 13
Moore v. *Radian Group Inc.*, No. 02-41464 (5th Cir. May 30, 2003) 15
Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 18, 19
Tumey v. *Ohio*, 273 U.S. 510 (1927) 12
Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 12, 13
Warth v. *Seldin*, 422 U.S. 490 (1975) 7
Williams v. *First Am. Title Ins. Co.*, No. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005) 15
Wilson v. *Glenwood Intermountain Props., Inc.*, 98 F.3d 590 (10th Cir. 1996) 16, 17
Yamaha Motor Corp., U.S.A. v. *Calhoun*, 516 U.S. 199 (1996) 18

Constitution, statutes, regulations and rules:

U.S. Const. Art. III ..... *passim*
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010):
§ 1061(b)(7), 124 Stat. 2038 2
§ 1062, 124 Stat. 2039-2040 2
§ 1098, 124 Stat. 2103-2104 2
§ 1100H, 124 Stat. 2113 2
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 16
Fair Housing Act, 42 U.S.C. 3601 *et seq.* 11

Statutes, regulations and rules—Continued: Page

Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231 3
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.* 1
12 U.S.C. 2601(a) 2
12 U.S.C. 2601(b)(2) 2, 4, 10
12 U.S.C. 2602(1) 2
12 U.S.C. 2602(3) 1
12 U.S.C. 2602(7) 2
12 U.S.C. 2605(f)(1) 9
12 U.S.C. 2605(f)(2) 9
12 U.S.C. 2607 ..... *passim*
12 U.S.C. 2607(a) 8, 9, 17, 19
12 U.S.C. 2607(b) 2, 3, 8, 13, 14
12 U.S.C. 2607(c) 2, 6
12 U.S.C. 2607(c)(4) 2
12 U.S.C. 2607(d) (1976) 3
12 U.S.C. 2607(d)(2) ..... *passim*
12 U.S.C. 2607(d)(2) (1976) 3
12 U.S.C. 2607(d)(4) 4
12 U.S.C. 2607(d)(5) 3
12 U.S.C. 2614 (1976) 3
12 U.S.C. 2617(a) 2
28 U.S.C. 1292(b) 6, 18
24 C.F.R.:
Pt. 3500 3
Section 3500.14(g)(2) 3
Fed. R. Civ. P. 23(f) 6, 18, 19
7th Cir. R. 40(e) 15

Miscellaneous: Page

H.R. Rep. No. 532, 97th Cong., 2d Sess. (1982) 12

In the Supreme Court of the United States

No. 10-708

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, to protect consumers in the market for "real estate settlement services." RESPA defines the term "[s]ettlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, loan processing and underwriting, and the like. 12 U.S.C. 2602(3). Congress found that consumers needed "greater and more

timely information on the nature and costs of the settlement process," as well as "protect[ion] from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a).

One of RESPA's stated "purpose[s]" is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. 2601(b)(2). RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. 2607(a).[1] RESPA also prohibits unearned fees by providing that no portion of the charge for any covered settlement service may go to any person "other than for services actually performed." 12 U.S.C. 2607(b). RESPA establishes limited exceptions to those prohibitions. 12 U.S.C. 2607(c). For example, RESPA allows certain "affiliated business arrangements," but only if such arrangements are disclosed to the consumer in advance and other specified conditions are satisfied. 12 U.S.C. 2607(c)(4); see 12 U.S.C. 2602(7) (defining "affiliated business arrangement").

Congress has authorized the Department of Housing and Urban Development (HUD) to administer RESPA. HUD may "prescribe such rules and regulations" and "make such interpretations * * * as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a).[2]

---

[1] The criteria for identifying "federally related" loans are set forth in 12 U.S.C. 2602(1).

[2] Later this year, the bulk of that authority will be transferred to the Bureau of Consumer Financial Protection. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113 (2010).

HUD regulations promulgated pursuant to that authority are codified at 24 C.F.R. Pt. 3500. One of those regulations provides that "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited." 24 C.F.R. 3500.14(g)(2).

RESPA initially provided for enforcement of Section 2607 only through criminal prosecution and private civil actions "to recover damages." 12 U.S.C. 2607(d), 2614 (1976). Damages for unlawful kickbacks were calculated by reference to the amount of the kickback. Under that version of the statute, a person who violated the anti-kickback prohibition was "liable to the person * * * whose business ha[d] been referred in an amount equal to three times the value or amount of the fee or thing of value" that was given and accepted pursuant to the unlawful agreement. 12 U.S.C. 2607(d)(2) (1976). Similarly, any person who violated the prohibition on unearned fees in Section 2607(b) was liable in the amount of three times the unearned fee, or the unearned portion of the fee. *Ibid.* The statute also authorized the award of attorney's fees to a successful plaintiff. *Ibid.*[3]

As amended in 1983, RESPA's remedies provision now states that statutory damages will be calculated by reference to the cost of the settlement service for which the consumer paid, rather than the amount of the kickback or the unearned fee. See Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231. Any person who violates the prohibition on kickbacks or unearned fees "shall be * * * liable to the person or persons charged for the settlement service involved in the violation

---

[3] The current version of RESPA authorizes the court to award costs and attorney's fees to "the prevailing party" in a private action under Section 2607. 12 U.S.C. 2607(d)(5).

in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The 1983 amendments also included a new provision authorizing the Secretary of HUD, state attorneys general, and state insurance commissioners to bring actions to enjoin violations of Section 2607. 12 U.S.C. 2607(d)(4).

2. Respondent purchased a home and used Tower City Title Agency, LLC (Tower City), as the settlement agent. Tower City referred respondent to petitioner First American Title Insurance Company (First American Title). Respondent purchased title insurance from First American Title, and she and the seller of the property shared the cost. Pet. App. 53a-54a. First American Title was a subsidiary of First American Corporation, whose successor in interest is also a petitioner here. *Id.* at 50a; Pet. ii.

Respondent alleges that First American Corporation paid kickbacks to Tower City in return for Tower City's agreement to refer all title-insurance underwriting business exclusively to First American Title. Pet. App. 51a, 53a. The kickback allegedly took the form of (a) First American Corporation's purchase of a minority interest in Tower City for "significantly more" than the entire agency was worth, and (b) a subsequent payment of more than $800,000. *Id.* at 51a-52a. Respondent alleged that First American Corporation did not exercise the prerogatives ordinarily associated with partial ownership, and that the company had acquired the minority stake "to give the kickback the appearance of legitimacy." *Id.* at 51a; see *id.* at 52a.

Respondent filed this putative class action, alleging that petitioners had violated Section 2607 by paying kickbacks for business referrals, and that those referrals were "calculated * * * 'to increase unnecessarily the costs' of title insurance." Pet. App. 49a (quoting 12 U.S.C. 2601(b)(2)); see *id.* at 58a. She further alleged that petitioners had not

disclosed their arrangement with Tower City to her, and that the tainted referral had denied her "the opportunity to compare prices on the open market." *Id.* at 52a; see *id.* at 49a. Respondent did not allege, however, that she had paid more for title insurance, or that she had received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback. See *id.* at 14a.

3. Petitioners moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. They argued, *inter alia*, that respondent had not been overcharged for her title insurance and therefore had not suffered any injury cognizable under RESPA or under Article III of the Constitution. Pet. App. 14a.

The district court denied the motion to dismiss. Pet. App. 12a-22a. The court first held that RESPA's "plain language" does not limit damages "to overcharges," but rather provides that "violators are liable for 'any charge paid' for [a] settlement service 'involved in' a violation of RESPA." *Id.* at 16a. The court found further support for that conclusion in the statutory history and in HUD's regulations. *Id.* at 17a-18a. The court concluded that respondent "need not have suffered an overcharge to invoke the protection of RESPA." *Id.* at 19a.

The district court further held that respondent had Article III standing. The court explained that "[b]y its 1983 amendment, Congress created a right to be free from referral-tainted settlement services." Pet. App. 19a. The court concluded that "[i]f [respondent] can prove her claim, there is a statutory injury fairly traceable to [petitioners'] action and redressable by a favorable decision. Accordingly, this Court has subject matter jurisdiction over the case." *Ibid.*

Finally, the court held that respondent had adequately pleaded the other elements of a RESPA claim. Pet. App. 20a-21a. In particular, the court held that respondent had

sufficiently alleged that petitioners paid kickbacks in exchange for referrals and did not provide the disclosure necessary to qualify for Section 2407(c)'s safe harbor. *Id.* at 21a. The court recognized that petitioners had controverted those allegations, but it concluded that resolution of that dispute was "better suited for argument in a motion for summary judgment." *Ibid.*

Petitioners asked the district court to certify its ruling for interlocutory appeal pursuant to 28 U.S.C. 1292(b), but the court declined. Order (Dec. 11, 2007).

The district court subsequently denied two motions by respondent for class certification. Pet. App. 23a-40a. The court of appeals allowed respondent to pursue an interlocutory appeal of the class-certification rulings. C.A. E.R. 27; see Fed. R. Civ. P. 23(f).[4] In a motion and in their answering brief, petitioners contended that the appeal should be dismissed, and that the district court lacked jurisdiction over the suit, because respondent did not have standing under either RESPA or Article III.

4. As relevant here, the court of appeals rejected petitioners' challenge to respondent's standing. Pet. App. 1a-7a.[5]

The court of appeals held that respondent has a cause of action under RESPA whether or not the alleged kickback affected the charge she paid for her title insurance. The court stated that, under the "clear" language of Section 2607, "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount

---

[4] Although the court of appeals stated in its subsequent opinion that "[d]efendants [*i.e.*, petitioners] brought this appeal," and that the court had appellate jurisdiction pursuant to 28 U.S.C. 1292(b), Pet. App. 2a, those statements were incorrect.

[5] As a result, the court reached the merits of the district court's class-certification orders, which it affirmed in part and reversed in part. Pet. App. 8a-11a.

of *any* charge paid. The use of the term 'any' demonstrates that charges are [not] restricted to a particular type of charge, such as an overcharge." Pet. App. 5a. The court also observed that the legislative history of the 1983 RESPA amendments reflects Congress's intent to protect consumers from non-economic injury. *Id.* at 6a-7a.

The court of appeals next explained that when Congress enacts "statutes creating legal rights," the "invasion" of those rights may "create[] standing" if the statutes "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Pet. App. 4a (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (intervening citation omitted). The court concluded that, because RESPA confers such a right on respondent, the allegation that petitioners had violated RESPA in selling respondent services made out "an injury sufficient to satisfy Article III." *Id.* at 5a.

Finally, the court observed that its holdings were in accord with those of two other circuits. Pet. App. 7a (citing *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009), and *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009)).

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any precedential decision of another court of appeals. RESPA provides a cause of action for a consumer who alleges a kickback in connection with a settlement service for which she was charged, whether or not the kickback demonstrably affected the price or quality of the relevant settlement service. Such a consumer has sufficient injury-in-fact to sue in federal court. In addition, this case came to the court of appeals on an interlocutory appeal from the district court's denial of class certification, and the posture of the case makes it an unsuitable vehicle for ple-

nary review. The petition for a writ of certiorari therefore should be denied.

A. The Decision Of The Court Of Appeals Is Correct

1. a. Section 2607(a) prohibits the payment or receipt of kickbacks in exchange for referring "business incident to or a part of a [covered] real estate settlement service." A payment therefore violates Section 2607(a) only if it has a specified nexus to a settlement service.[6] Section 2607(d)(2), in turn, provides that anyone who violates Section 2607 is liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." The use of the definite article—"*the* settlement service involved in the violation"—confirms that the settlement service that is the basis for civil liability is the same settlement service already referred to in the substantive prohibition, *i.e.*, the service "incident to" which, or as "part of" which, the referral was made and the kickback paid.

The critical facts that trigger liability for statutory damages under Section 2607(d)(2) are the "violation" of the substantive prohibitions of Section 2607 and the plaintiff's payment of a "charge[] for the settlement service involved in the violation." Nothing in RESPA suggests that either the existence of a violation or a plaintiff's right to invoke the statutory-damages provision turns on a comparison between the price the plaintiff paid and the price he would have paid if no kickback had occurred. The court below therefore was correct to hold, consistent with decisions of the Third and Sixth Circuits, that the "clear" language of Section 2607(d)(2) does not require plaintiffs to establish that the unlawful kickback resulted in an overcharge. Pet. App. 5a; accord *Alston* v. *Countrywide Fin. Corp.*, 585 F.2d

---

[6] Similarly, Section 2607(b) states that unearned fees are illegal when charged for "a real estate settlement service."

753, 759 (3d Cir. 2009) ("The plain language of [Section 2607] does not require plaintiffs to allege an overcharge."); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009) (holding that "the plain language of the statute" does not impose such a requirement).

Petitioners argue (Pet. 22) that, even if a particular payment is made in exchange for a settlement-service referral, the relevant settlement service is not "involved in the violation" unless the kickback affects the "price, quality, or other characteristics" of the service. Consistent with applicable HUD regulations (see p. 3, *supra*), petitioners appear to acknowledge (*e.g.*, Pet. 23; Cert. Reply 8 n.6) that a payment can violate Section 2607(a) even though no such effect is present. Petitioners' argument thus assumes that there can be violations of Section 2607(a) in which no settlement service is "involved." As explained above, however, the *sine qua non* of a Section 2607(a) violation is a specified connection between a payment and a settlement service. And Congress would not likely have referred to "*the* settlement service involved in the violation" if it had contemplated that settlement services would be involved in some Section 2607(a) violations but not in others.

b. Other provisions of RESPA confirm that the plaintiff in a Section 2607(d)(2) suit is not required to prove an actual impact on the price or quality of the relevant settlement service. "Congress knew how to limit recovery [under RESPA] to actual, out-of-pocket damages." *Alston*, 585 F.3d at 761. For example, recovery for a violation of a different RESPA provision, which governs the assignment, sale, or transfer of loan servicing, is limited to the borrower's "actual damages," as well as "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance," up to $1000. 12 U.S.C. 2605(f)(1); see 12 U.S.C. 2605(f)(2) ("actual damages" plus "additional damages" in class actions involving violations of that provision).

Under Section 2607(d)(2), by contrast, quantification of statutory damages does not turn on a comparison between the fee that the plaintiff paid and the fee he would have paid if no kickback had occurred, or upon proof that the kickback tangibly affected the quality of the relevant settlement service. Rather, under the 1983 RESPA amendments, the remedy for all violations of Section 2607 is based on the total cost of the settlement service.

Contrary to petitioners' contention (Pet. 22), Congress's finding that kickbacks "tend to increase unnecessarily the costs of certain settlement services," 12 U.S.C. 2601(b)(2), does not support petitioners' reading of Section 2607(d)(2). Kickback schemes can often involve numerous participants and complex payment and referral arrangements, making it difficult or impossible to quantify and apportion the injury to a particular consumer whose settlement is linked to such a kickback. Congress could reasonably conclude that kickbacks for settlement-service referrals cause substantial aggregate harm, see Am. Escrow Ass'n Br. 7 (acknowledging that kickbacks are ultimately passed on to consumers as "a cost of doing business"), but that Section 2607(d)(2)'s remedial and deterrent objectives would be disserved by requiring case-specific proof of such an effect.

2. The court of appeals also correctly held that respondent has alleged sufficient injury to establish her standing under Article III. On respondent's theory, petitioners' unlawful kickback arrangement caused her to pay for a settlement service based on a tainted referral. Petitioners therefore infringed her statutory rights under RESPA in a way that caused her a particularized, concrete injury.

a. The Court has long held that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). Even if an allegation would be "inadequate in law"

to support standing in the absence of a statute, Congress may "elevat[e]" such claims "to the status of legally cognizable injuries" that support Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992). To be sure, certain "generally available grievance[s] about government" are too "abstract and indefinite" to confer standing, whether or not they are codified in a statute. *Id.* at 573-578; *FEC* v. *Akins*, 524 U.S. 11, 23 (1998). But there is no requirement that statutory injury (or any injury-in-fact) be economic in nature. See, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 562-563 ("purely esthetic" injury).

Thus, for instance, a statutory right to receive information can confer standing. See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-375 (1982) (holding that a "tester" had standing to sue over a verbal misrepresentation about apartment availability because the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, creates a "right to truthful housing information," even if the tester "fully expect[ed] that he would receive false information, and [had no] intention of buying or renting"); accord *Akins*, 524 U.S. at 21. Similarly, even though the existence of business competition is not ordinarily a cognizable injury, Congress can create a statutory "competitive injury" that gives businesses a statutory right to sue to exclude their would-be competitors from the market. *Hardin* v. *Kentucky Utils. Co.*, 390 U.S. 1, 5-6 (1968); see *Defenders of Wildlife*, 504 U.S. at 578.

Section 2607 gives consumers the legal right to a real estate settlement untainted by kickbacks, improper referrals, and unearned fees.[7] As the legislative history of

---

[7] Amici contend (Am. Escrow Ass'n Br. 10-13) that Section 2607 does not require untainted referrals because its exceptions allow for compensated referrals in certain limited circumstances. But those exceptions do not apply on the facts pleaded here, and the mere *existence* of exceptions says nothing about the taint caused by kickbacks prohibited by the general rule.

amended Section 2607 explains, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror [*sic*] or his associates have a financial interest in the company being recommended." H.R. Rep. No. 532, 97th Cong., 2d Sess. 52 (1982). RESPA's kickback prohibition thus serves in part as a conflict-of-interest rule that protects consumers' ability to receive dispassionate settlement-service advice. The constitutional authority of federal courts to grant relief for violations of federal conflict-of-interest rules does not depend on proof that a violation actually affected the outcome of the conflicted person's decision. Cf., *e.g.*, *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-870 (1988) (affirming new-trial order based on district court's conflict of interest, without suggesting that district court's merits rulings had been demonstrably affected by the conflict); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927) (holding that trial judge's financial incentive to convict deprived defendant of his right to due process of law, regardless of the strength of the evidence of guilt, because "[n]o matter what the evidence was against him, he had the right to have an impartial judge").

Section 2607(d)(2)'s cause of action is available, moreover, only to plaintiffs who have made a monetary outlay that bears a specified nexus to the unlawful kickback, *i.e.*, plaintiffs who have been "charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2).[8] Thus,

---

[8] Neither respondent's claim of individualized injury, nor the decision below, is based on respondent's naked financial interest in the statutory damages she may recover. Petitioners' reliance (Pet. 28-29) on *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), is therefore misplaced. Although the interest in recovering a statutory bounty standing alone may not be sufficient to

Congress has both "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Congress acted well within its constitutional authority in determining that a person who pays money for a settlement service, based on a referral tainted by financial self-interest, can obtain judicial relief without proving in addition that the kickback affected the price or quality of the relevant settlement service. See *Carter*, 553 F.3d at 989 (consumer who alleges a Section 2607 violation "plainly [has] an individualized injury"); *Alston*, 585 F.3d at 763 (same); cf. *Defenders of Wildlife*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

B. This Case Does Not Present A Circuit Conflict Warranting This Court's Review

1. Two other courts of appeals have squarely decided, in precedential opinions, the question of RESPA interpretation that petitioners present. Both of those rulings are consistent with the decision below. See *Carter*, 553 F.3d at 989; *Alston*, 585 F.3d at 763. No court of appeals has adopted the reading of Section 2607(d)(2) that petitioners advance, under which the phrase "involved in the violation" excludes any settlement service that the violation did not demonstrably affect in specified ways, see p. 9, *supra*. Petitioners rely on an inapposite Seventh Circuit case and a non-precedential Fifth Circuit decision, but neither establishes a conflict that warrants review.

---

confer standing, respondent sufficiently asserts that the tainted referral caused "the violation of [her] legally protected right." *Id.* at 772-773.

In *Durr* v. *Intercounty Title Co.*, 14 F.3d 1183, 1185 (7th Cir.), cert. denied, 513 U.S. 811 (1994), the plaintiff claimed that he had been overcharged $8 for a particular recording fee, and that the overcharge violated Section 2607(b). He sought to recover three times the amount he had paid the defendant for *all* settlement services, including settlement services that did not relate to any RESPA violation. The district court held that Durr had not stated a claim under Section 2607(b), and it imposed Rule 11 sanctions on Durr's counsel for the excessive damage request. *Id.* at 1186.

The court of appeals upheld both rulings. First, the court held that the overcharge did not violate Section 2607(b) because it was not shared with anyone and did not represent a fee-splitting arrangement. 14 F.3d at 1187.[9] Second, the court upheld the attorney sanctions as a permissible exercise of the district court's discretion, on the ground that Durr's counsel had no apparent basis for claiming statutory damages based on charges for untainted services. The court stated in passing that, although the complaint could have properly sought damages for the alleged overcharge, "[t]o the extent the claim exceeded three times the $8.00, * * * there was no basis for it." *Id.* at 1188. The Seventh Circuit did not adopt petitioners' reading of Section 2607(d)(2); it did not discuss or analyze the statutory text; and precise parsing of Section 2607(d)(2) was unnecessary to the court's disposition of the case. Accordingly, the decision in *Durr* (which was rendered well before three other circuits clearly and uniformly answered the RESPA question presented here) does not create any conflict warranting this Court's review.[10]

---

[9] The correctness of that construction of Section 2607(b) is not presented here, but is the question presented in *Freeman* v. *Quicken Loans, Inc.*, petition for cert. pending, No. 10-1042 (filed Feb. 15, 2011).

[10] To the extent that *Durr* can be misread (as some district courts have done, Cert. Reply 4) to reach a holding that would conflict with

Petitioners also rely on the unpublished decision in *Moore* v. *Radian Group Inc.*, No. 02-41464 (5th Cir. May 30, 2003). That decision clearly states, however, that it is "not precedent" even in the Fifth Circuit, "except under the limited circumstances set forth in 5th Cir. R. 47.5.4," *i.e.*, for purposes of res judicata, collateral estoppel, and law of the case. *Id.* slip op. 1 n.1. As respondents note (Br. in Opp. 15 n.8), although this Court may sometimes grant review of a non-precedential decision to resolve a conflict between circuits' precedential decisions, a non-precedential decision (like a district court decision) does not *by itself* establish a conflict because it does not bind any other court, even in the circuit that issued it.[11] Furthermore, although the Fifth Circuit in *Moore* addressed a question similar to the one presented here, and held that the plaintiff had not stated a claim under RESPA, the court found it unnecessary to decide "which portions of the settlement charge are available for trebling under [Section] 2607(d)(2)." *Moore*, slip op. 10. The court thus did not adopt the construction of the phrase "involved in the violation" that petitioners advance here.[12]

2. Petitioners also allege a circuit conflict on the Article III standing question, but the decisions on which they rely

---

Carter, *Alston*, and the decision below, any Seventh Circuit panel could disavow that reading and eliminate the conflict without full rehearing en banc. See 7th Cir. R. 40(e).

[11] Petitioners contend (Cert. Reply 3) that district courts in the Fifth Circuit can "be expected to follow *Moore*," but their sole example actually cited the *district court* opinion in *Moore*, which it described as having been affirmed "*without opinion*." *Williams* v. *First Am. Title Ins. Co.*, No. 2:02CV194-B-B, 2005 WL 2219460, at *2 (N.D. Miss. Sept. 13, 2005).

[12] To the extent that the court addressed Article III standing, it did so only on the premise that RESPA did not, as a statutory matter, "grant persons in the plaintiffs' position [a] right to judicial relief." *Moore*, slip op. 13.

arose in different contexts. Thus, in *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), the plaintiff contended that she could sue her retirement plan for violating the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, even if she could not show "individualized harm" as a participant in the plan. 561 F.3d at 117, 118, 120. The Second Circuit held that the plaintiff was required to "allege some injury or deprivation of a specific right that arose from" the statutory duty to comply with ERISA. *Id.* at 121. But the court acknowledged that plaintiffs who sue to enforce certain ERISA requirements—such as a statutory disclosure obligation—can establish standing even though their rights are shared in common with other plan participants. *Id.* at 120-121. The court thus recognized that the range of plaintiffs who may sue to challenge an alleged statutory violation depends on the nature of the statutory right in question. *Kendall* sheds no light on what rights respondent has under RESPA or whether she has standing to enforce those rights.

Wilson v. *Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), is even farther afield. The plaintiffs in that case sought to challenge allegedly discriminatory housing practices. See *id.* at 592. The court of appeals held that the plaintiffs lacked standing to sue because they were ineligible to live in the relevant housing for reasons unrelated to the alleged discrimination (*i.e.*, because the housing was open only to Brigham Young University (BYU) students, and the plaintiffs were not BYU students). See *id.* at 593-594. The plaintiffs also challenged the defendants' use of advertisements for gender-segregated housing, contending that those advertisements violated a separate provision of the Fair Housing Act. See *id.* at 594. The court held that the plaintiffs' "mere receipt" of allegedly unlawful advertisements, which were not directed at the

plaintiffs and were not alleged to have affected their behavior, created at most an "abstract stigmatic injury," which is insufficient under Article III. *Id.* at 595-596.

This case, by contrast, involves an *individualized* injury to respondent rather than an abstract or generalized grievance. In order to recover under RESPA, respondent will be required to prove that she paid money for a settlement service, and that an unlawful kickback was made in connection with that particular service. The decisions on which petitioners rely do not speak to the question whether that link between plaintiff and violation is sufficient to establish Article III standing.

3. The questions presented are not of sufficient magnitude to warrant resolution in the absence of a circuit conflict. Petitioners' amici suggest (Am. Land Title Ass'n Br. 2-3) that the decision below "threatens" certain common business relationships within the title industry. That argument, however, goes to the question whether the conduct of which respondent complains actually violated RESPA's anti-kickback prohibition, not to the question whether respondent is entitled to sue. The court below did not decide, and the petition for a writ of certiorari does not present any question concerning, whether respondent's complaint states a claim under Section 2607(a). See also pp. 19-20, *infra*.

C. This Case Is An Unsuitable Vehicle For Resolution Of The Questions Presented Because The Case Is Currently In An Interlocutory Posture And The Ninth Circuit's Jurisdiction Rested On Respondent's Appeal From The Denial Of Class Certification

This Court generally does not grant plenary review at an interlocutory stage of a case. Two aspects of this case provide especially strong reasons for adhering to that general practice. First, the decision below rested on a limited grant of appellate jurisdiction that could artificially constrain the scope of this Court's review. Second, there is a

significant possibility that the RESPA claim in this case will be resolved on other grounds.

1. As explained above (see pp. 5-6 & note 4, *supra*), the district court denied petitioners' motion to dismiss *and* denied their motion to certify that ruling for interlocutory appeal. This case moved to the court of appeals only because *respondent* appealed the denial of class certification pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The court of appeals therefore had jurisdiction to review only the class-certification "order" itself. Fed. R. Civ. P. 23(f); cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (interlocutory appeal under 28 U.S.C. 1292(b) "may not reach beyond the certified order to address other orders made in the case").

In responding to the class-certification appeal, petitioners asserted that the district court lacked subject-matter jurisdiction because respondent lacked standing. The courts of appeals generally agree that jurisdictional issues of that sort may be decided in a Rule 23(f) appeal. See, *e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002). Thus, to the extent that it is necessary to construe RESPA to determine respondent's Article III standing, that exercise would be within the court's appellate jurisdiction.

Petitioners argue, however, that this Court should grant review to consider issues going beyond the presence or absence of Article III standing. For example, petitioners urge the Court to construe RESPA narrowly to avoid the "grave concerns" under Article III that they believe the decision below creates. Pet. 23. Petitioners characterize the question of Section 2607(d)(2)'s coverage as one of "standing." But statutory standing refers to the question "whether [the statute] authorizes this plaintiff to sue," whereas "the scope of the [statutory] right of action * * * goes to the merits and not to statutory standing." *Steel Co.*

v. *Citizens for a Better Env't*, 523 U.S. 83, 92 (1998); see also *id.* at 97 (zone-of-interests limitation on prudential standing is an example of statutory standing). Even if petitioners' characterization were accurate, moreover, it is far from clear that statutory standing may be raised on a Rule 23(f) appeal, since the issue of statutory standing (like the question whether petitioners' conduct violated Section 2607(a)) "has nothing to do with whether there is [a] case or controversy under Article III." *Id.* at 97. And petitioners do not explain how an inquiry into statutory standing is properly part of the review of class certification. See Pet. App. 10a-11a.

2. The interlocutory posture of this case makes the questions petitioners present particularly abstract. In a pending dispositive motion, petitioners contend that Tower City did not engage in "referr[als]" within the meaning of Section 2607(a), but merely issued policies underwritten by First American Title as its agent, and that petitioners' payments to Tower City therefore were not prohibited by RESPA. See Mem. in Supp. of Mot. for J. on Pleadings (filed Apr. 25, 2011) (set for hearing July 5, 2011); see also Cert. Reply 10 (arguing that petitioners' particular arrangement with Tower City could not have affected competition). Petitioners also have asserted numerous affirmative defenses, including that the alleged kickback to Tower City represented payment for fair market value. See Am. Answer 6 (filed Feb. 23, 2011). If petitioners prevail on any of those merits grounds, it will be unnecessary to determine the proper application of RESPA's statutory-damages remedy to the circumstances of this case.

Petitioners contend in this Court, as part of their standing argument, that *no* aspect of respondent's settlement service was affected by the referral agreement because respondent did not "have any complaints about" her title insurance. Pet. 6; see Pet. 26. But that factual averment

may be controverted if the litigation is allowed to proceed. Indeed, the deposition excerpts that petitioners cite (Pet. 6 & nn.2-3) are not yet in the district court record, but rather were appended to a procedural filing in the court of appeals. Whether and to what extent respondent was satisfied with her settlement services is a factual question that this Court cannot examine at this stage (except to the extent the complaint addresses it), and any ruling on the standing question that depends on knowing whether petitioner was satisfied would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
WILLIAM M. JAY
Assistant to the Solicitor General
MICHAEL JAY SINGER
CHRISTINE N. KOHL
Attorneys

HELEN R. KANOVSKY
General Counsel
Department of Housing and Urban Development

MAY 2011

AMICUS CURIAE BRIEF

FILED
OCT 18 2011
OFFICE OF THE CLERK

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE AARP, CENTER FOR RESPONSIBLE LENDING, NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMERS LEAGUE, AND PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amici Curiae

October 2011

Library of C...
Law L...

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Statutory Damages Provisions in Consumer-Protection Statutes Allow for Recovery Where Monetary or Other Harm Is Difficult to Quantify. 5

A. RESPA's Enactment Reflected Congressional Intent to Provide a Remedy for Practices That Are Injurious to Consumers. 5

B. Modern Consumer-Protection Statutes Permitting the Award of Damages in the Absence of Provable Monetary Loss Have Strong Common-Law and Statutory Antecedents. 8

C. Many Consumer-Protection Laws Similarly Provide for Damages Recoveries in the Absence of Proof of Pecuniary Loss. 11

II. Permitting RESPA Plaintiffs to Seek Statutory Damages Without Proving Monetary Loss Does Not Undermine the Values of Constitutional Standing. 20

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases:

In re Aimster Copyright Litig.,
334 F.3d 643 (7th Cir. 2003) 11

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) 21, 23

Anderson v. AFNI, Inc.,
2011 WL 1808779 (E.D. Pa. May 11, 2011) 16

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 23

Baker v. Carr,
369 U.S. 186 (1962) 20

Baker v. G.C. Servs. Corp.,
677 F.2d 775 (9th Cir. 1982) 14

Beam v. Mukasey,
2008 WL 4614324 (N.D. Ill. Oct. 15, 2008) 19

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 12, 13, 21, 23

Carey v. Piphus,
435 U.S. 247 (1978) 9

Cook v. ACS State & Local Solutions, Inc.,
756 F. Supp. 2d 1104 (W.D. Mo. 2010) 17

Crabill v. Trans Union, L.L.C.,
259 F.3d 662 (7th Cir. 2001) 4, 22

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 20

Douglas v. Cunningham,
294 U.S. 207 (1935) 10

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985) 8, 9

Edwards v. Your Credit Inc.,
148 F.3d 427 (5th Cir. 1998) 18

Egenet, Inc. v. GS1 AISBL,
742 F. Supp. 2d 997 (E.D. Wis. 2010) 11

FEC v. Akins,
524 U.S. 11 (1998) 22, 23, 25

F.W. Woolworth Co. v. Contemporary Arts, Inc.,
344 U.S. 228 (1952) 10

Hein v. Freedom From Religion Found.,
551 U.S. 587 (2007) 23

Keele v. Wexler,
149 F.3d 589 (7th Cir. 1998) 14, 15

Kehoe v. Fidelity Fed. Bank & Trust,
421 F.3d 1209 (11th Cir. 2005) 17

L. Singer & Sons v. Union Pac. R.R. Co.,
311 U.S. 295 (1940) 22

Landsman & Funk, P.C. v. Lorman Bus. Ctr., Inc.,
2009 WL 602019 (W.D. Wis. Mar. 9, 2009) 16

Leyse v. Bank of Am., Nat'l Ass'n,
2010 WL 2382400 (S.D.N.Y. June 14, 2010) 16

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 24

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 21, 23, 25

Massachusetts v. EPA,
549 U.S. 497 (2007) 20, 25

Miller v. Wolpoff & Abramson, L.L.P.,
321 F.3d 292 (2d Cir. 2003) 14

Mourning v. Family Publications Serv. Inc.,
411 U.S. 356 (1973) 18

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 12

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 8

Parsus v. Cator,
2005 WL 2240955 (W.D. Wis. Sept. 14, 2005) 17

Pollard v. Lyon,
91 U.S. 225 (1875) 8

Public Citizen v. United States Dep't of Justice,
491 U.S. 440 (1989) 25

Raines v. Byrd,
521 U.S. 811 (1997) 24, 26

Ramirez v. MGM Mirage, Inc.,
524 F. Supp. 2d 1226 (D. Nev. 2007) 19

Robey v. Shapiro, Marianos & Cejda, L.L.C.,
434 F.3d 1208 (10th Cir. 2006) 14

Rule v. Ft. Dodge Animal Health, Inc.,
607 F.3d 250 (1st Cir. 2010) 26

Sprint Comms. Co., L.P. v. APCC Servs., Inc.,
554 U.S. 269 (2008) 20, 26

Taylor v. Acxiom Corp.,
612 F.3d 325 (5th Cir. 2010) 17

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 21

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 22, 26

Warth v. Seldin, 422 U.S. 490 (1975) 23, 24

Womack v. Nissan N. Am., Inc., 550 F. Supp. 2d 630 (E.D. Tex. 2007) 15

Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877 (11th Cir. 1982) 18

Constitutional Provisions, Statutes, and Rules:

U.S. Const., Art. III ..... *passim*

Copyright Act, 17 U.S.C. § 501(b) 9

§ 502 9

§ 504(b) 9

§ 504(c) 9

Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B) 15

Driver's Privacy Protection Act (DPPA), 18 U.S.C. § 2724 16

§ 2724(a) 17

§ 2724(b)(1) 17

Electronic Communications Privacy Act, 18 U.S.C. § 2707(c) 19

§ 2520(c) 19

Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a)(2) 15

Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g) 19

Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681(a)(4) 12

§ 1681(b) 12

§ 1681a(f) 12

§ 1681b 12

§ 1681c 12

§ 1681c-1 12

§ 1681c-2 12

§ 1681e 12

§ 1681e(b) 13

§ 1681n 12

§ 1681n(a)(1)(A) 12

Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 13

§ 1692(a) 13

§ 1692(e) 13

§ 1692b 13

§ 1692c 13

§ 1692d 13

§ 1692e 13

§ 1692f 13

§ 1692k(a) 14

Federal Odometer Act, 49 U.S.C. § 32710(a) 15

Real Estate Settlement Procedures Act (RESPA)
Pub. L. No. 93-533, 88 Stat. 1724 (1974) ..... *passim*

§ 2, 12 U.S.C. § 2601 7

§ 2(b)(2), 12 U.S.C. § 2601(b)(2) 7

§ 8(a), 12 U.S.C. § 2607(a) 7

§ 8(d), 12 U.S.C. § 2607(d) 7

§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 7

Right to Financial Privacy Act (RFPA),
12 U.S.C. 3417(a)(1) 19

Truth in Lending Act (TILA)
15 U.S.C. § 1640(a)(2)(A) 17, 18

Telephone Consumer Protection Act (TCPA),
Pub. L. No. 102-243, § 2, 105 Stat. 2394
(1991) 15, 16

47 U.S.C. § 227 15

§ 227(c)(5) 15

Video Privacy Protection Act,
18 U.S.C. § 2710(c)(2)(a) 19

Other:

H.R. Rep. No. 97-532 (1982) 7

Mortgage Settlement Costs, Report of Department of Housing and Urban Development and Veterans' Administration (1972) 6

S. Rep. No. 90-392 (1967) 18

S. Rep. No. 93-866 (1974) 5

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of organizations interested in the effective enforcement of consumer-protection laws, including the law at issue in this case, the Real Estatement Settlement Procedures Act, or RESPA.[1] Amici submit this brief to assist the Court in understanding the range of federal consumer-protection statutes whose purposes could be adversely affected by a ruling that proof of pecuniary loss is necessary for Article III standing under statutes where Congress has given consumers a legally protected interest and provided statutory damages as a remedy for the injury they suffer when that interest is infringed.

AARP is the leading organization representing the interests of people aged 50 and older. AARP is greatly concerned about the illegal, unfair and deceptive settlement charges imposed on older homeowners, many of whom are especially vulnerable to such abuses.

Center for Responsible Lending (CRL) is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. To advance this mission, CRL's litigation team regularly relies on consumer

---

[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief.

protection statutes, like RESPA, that provide the remedy of statutory damages as redress for consumer harm, when it litigates on behalf of consumers victimized by predatory and abusive financial practices.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes an 18-volume Consumer Credit and Sales Legal Practice Series, and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The National Consumers League (NCL), founded in 1899, is nation's oldest consumer organization. The mission of the NCL is to protect and promote social and economic justice for consumers and workers in the United States and abroad. On behalf of the general consuming public, the NCL appears before legislatures, administrative agencies, and the courts on a wide range of issues, and promotes laws protecting consumers. The NCL also educates consumers on ways to avoid fraud in the marketplace through its National Fraud Center.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, represents its approximately 225,000 members and supporters nationwide before

Congress, administrative agencies, and courts, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has often litigated issues of standing, and is concerned that the argument that the plaintiffs in this case lack standing to pursue a cause of action for statutory damages conferred on them by Congress would impair the effectiveness of remedies for consumers contained in a host of federal statutes that similarly provide for monetary recoveries without proof of pecuniary loss.

SUMMARY OF ARGUMENT

Where a statutory violation will cause financial harm or other harm to consumers, but the extent of that harm would be difficult or burdensome to prove in individual cases, Congress has often permitted plaintiffs to sue for statutory damages without proof of pecuniary harm. Consumer-protection statutes regularly fit this description. Violations of consumer-protection statutes frequently affect markets in which businesses operate in ways that will predictably harm consumers financially. The harms, however, can be small by traditional measures and difficult to distinguish from other factors affecting the consumer's experience. Because proving monetary damages can cost more than the harm suffered, few consumers would accept this cost if recoveries were limited to proven monetary losses.

With this concern in mind, Congress has long included statutory damages provisions in consumer-protection statutes. As Judge Posner has explained, "[m]any statutes, notably consumer-protection statutes, authorize the award of damages (called 'statutory damages') for violations that cause so little measurable injury that the cost of proving up damages

would exceed the damages themselves, making the right to sue nugatory." *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir. 2001). Such statutes create legally protected interests and thus confer standing on a consumer who thereafter is injured by participation in a transaction tainted by a statutory violation that infringes the consumer's protected interest. Such statutes also provide measures of recovery that reinforce Article III values by ensuring that plaintiffs have concrete stakes in litigation to enforce their rights. At the same time, statutory damages provisions reflect Congress's weighing of such considerations as the amount of financial harm likely attributable to the misconduct at issue, the amount of recovery needed to motivate plaintiffs to bring actions and to deter misconduct, and the need to avoid excessive financial burden on defendants that might result from overlarge and disproportionate recoveries.

Upholding the power of Congress to provide RESPA plaintiffs causes of action without proof of monetary loss does not offend the core values reflected in constitutional standing doctrine. RESPA plaintiffs who have participated in an anticompetitive settlement services transaction have a sufficient personal stake in a case to assure concrete adverseness. They must allege concrete and particularized facts about their personal involvement in a transaction in which statutory rights specifically conferred upon them by Congress were violated. And because they may obtain statutory damages if they are successful, they have an interest in the suit's outcome. Relatedly, because RESPA plaintiffs are not asserting rights shared by the public at large, and because they are not suing to enjoin action by another branch of government, recognizing standing in these cases does not raise separation of powers concerns.

ARGUMENT

I. Statutory Damages Provisions in Consumer-Protection Statutes Allow for Recovery Where Monetary or Other Harm Is Difficult to Quantify.

A. RESPA's Enactment Reflected Congressional Intent to Provide a Remedy for Practices That Are Injurious to Consumers.

In RESPA, Congress provided consumers with a right of action for statutory damages that is not dependent on a showing of actual monetary loss. Congress created this remedial scheme because of its express recognition that the conduct it prohibited in RESPA has broad anticompetitive effects that impose very real costs on consumers of settlement services. But because of the inherent difficulty and excessive cost that would be needed to prove that the plaintiff in a transaction tainted by a settlement agent's conflict of interest paid more, received poorer service, or received a lower-quality product, statutory damages are an integral part of Congress's effort to provide consumers with a practical remedy that will serve values of both deterrence and compensation.

Before the passage of RESPA, Congress enacted the Emergency Home Finance Act of 1970, which directed the heads of the Veterans Administration (VA) and Housing and Urban Development (HUD) to conduct a joint study and recommend to Congress what actions Congress should take to reduce and standardize mortgage settlement costs. *See* S. Rep. No. 93-866, at 1 (1974). The report of that study identified several problem areas in the mortgage settlement market and recommended that Congress take immediate action to address these problems. Among its findings were:

> 6. The buyer seldom decides who will provide settlement services for him. If there is a choice, he usually depends upon advice of the broker, escrow agent, seller, or settlement attorney. Often the buyer is or believes he is required to deal with a particular source for some or all settlement services.
>
> 7. Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, *rarely inure to the benefit of the home buyer, and generally increase total settlement costs*.
>
> 8. Settlement charges often are based on factors unrelated to the cost of providing the services. The overall level of charges tends to be significantly lower when the charge for a service is not directly related to the sales price of the property.

Mortgage Settlement Costs, Report of Department of Housing and Urban Development and Veterans' Administration 2-3 (1972) (hereafter HUD-VA Report) (emphasis added).

The HUD-VA Report further explained how the combination of the lack of competition in the mortgage settlement industry and the existence of kickback arrangements harms consumers. Because of the absence of consumer choice and the pervasiveness of referral arrangements, the Report found, "[t]he competition that exists in this industry ... is not based on price, because the ultimate consumer has a small voice in that decision." *Id.* at 15-16.

Less than three years later, in enacting RESPA, Congress expressly adopted and implemented the rec-

ommendations made in the HUD-VA Report. Pub. L. No. 93-533, § 2, 88 Stat. 1724 (1974), *codified at* 12 U.S.C. § 2601). One stated purpose of the Act was to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *Id.* § 2(b)(2), 12 U.S.C. § 2601(b)(2). Toward this end, section 8(a) of RESPA provides:

> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

12 U.S.C. § 2607(a). Under section 8(d)(2), any person who violates section 8(a) shall be liable to the "person or persons whose business has been referred ... in an amount equal to three times the value or amount of the fee or thing of value." 12 U.S.C. § 2607(d)(2).

Section 8(d) thus provides a right of action to consumers who participate in an anticompetitive settlement services transaction. Read against the backdrop of the HUD-VA Report, section 8(d) reflects Congress's belief that consumers who participate in such a transaction ordinarily suffer economic loss, whether through higher premiums, lower-quality service, or a lower-quality product. As stated in a 1982 House Report supporting a bill that sought to clarify section 8's anti-kickback provision, "a consumer who is referred by a real estate professional to a controlled title insurance company is likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." H.R. Rep. No. 97-532, at 51 (1982). In light of the difficulty of proving any one of these harms in a given case, Congress reasonably cre-

ated a statutory entitlement not to be subject to such a conflict of interest, reinforced by a right to recover an amount that reflects the reality that consumers who are subjected to anticompetitive settlement services practices suffer genuine, if difficult to document, economic detriment.

B. Modern Consumer-Protection Statutes Permitting the Award of Damages in the Absence of Provable Monetary Loss Have Strong Common-Law and Statutory Antecedents.

In providing a RESPA damages remedy for injurious practices not tied to proof of pecuniary loss, Congress acted within a longstanding tradition recognizing the legitimacy of such remedies for infringements of both common-law and statutory interests. For example, "courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (plurality opinion) (citing Restatement of Torts § 568, cmt. b, p. 162 (1938), for the proposition "that damages were to be presumed for libel as early as 1670"). *See also, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) ("Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars."); *Pollard v. Lyon*, 91 U.S. 225, 227 (1875) ("Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff[.]").

"The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cas-

es where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" *Dun & Bradstreet, Inc*, 472 U.S. at 760 (plurality opinion) (quoting W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)); *see also Carey v. Piphus*, 435 U.S. 247, 262 n.17 (1978) ("'By the very nature of harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle.'" (quoting 1 F. Harper & F. James, *Law of Torts* § 5.30, p. 468 (1956))).

In the realm of statutory rights of action, this Court has long recognized the legitimacy of a damages remedy not tied to a demonstration of actual monetary loss in the Copyright Act. Specifically, the Act provides that infringement of copyright is itself a violation of a legally protected interest—an injury—that may serve as the basis for an action seeking both damages and injunctive relief. Thus, the current statute provides that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled ... to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(b); *see also id.* § 502 (authorizing injunctive relief); *id.* § 504(b) (authorizing recovery of actual damages). Further, more than a century ago, Congress provided that a successful copyright infringement plaintiff may recover, as alternatives to actual damages, either the profits earned by the infringer (regardless of whether the plaintiff would have earned comparable profits in the absence of infringement) or statutory damages ranging from a few hundred dollars for a single infringing copy to tens of thousands of dollars for larger-scale infringement. *Id.* § 504(c).

A copyright plaintiff's entitlement to statutory damages does not depend on proof of any injury beyond the deprivation of the statutory entitlement to prevent infringing acts. Instead, the statute "give[s] the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits," and also serves to deter "willful and deliberate infringement." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). As Justice Jackson explained in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), statutory damages play a critical role in fostering the purposes of copyright law:

> [A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.

Id. at 233.

The injury inherent in the violation of the statutory entitlement to prevent unauthorized copying, together with the concrete stake in the outcome of the litigation created by the congressionally authorized remedies of statutory damages and injunctive relief, suffice to create standing for a copyright infringement plaintiff regardless of whether she has suffered a de-

monstrable financial loss. Thus, "a copyright owner who can prove infringement need not show that the infringement caused him a financial loss." *In re Aimster Copyright Litig.*, 334 F.3d 643, 649 (7th Cir. 2003) (Posner, J.). Although without such a showing he cannot obtain compensatory damages, "he can obtain statutory damages, or an injunction, just as the owner of physical property can obtain an injunction against a trespasser without proving that the trespass has caused him a financial loss." *Id.*; *see also Egenet, Inc. v. GS1 AISBL*, 742 F. Supp. 2d 997, 1014 (E.D. Wis. 2010) (rejecting argument that copyright owner did not have statutory and constitutional standing because it failed to plead actual financial loss).

C. Many Consumer-Protection Laws Similarly Provide for Damages Recoveries in the Absence of Proof of Pecuniary Loss.

1. Numerous consumer-protection statutes, including RESPA, borrow from the common-law and statutory tradition of permitting presumed or statutory damages for violations of legally protected interests that may not give rise to provable monetary loss. The concern underlying many of these statutes is the protection of broad economic interests of consumers, but they do not do so by requiring proof of monetary loss in particular transactions. Rather, they give consumers legal entitlements whose infringement constitutes injury, backed by statutory damages remedies that both give teeth to the substantive terms of the legislation and ensure concrete adverseness in litigation over claims that a defendant committed a violation.

For example, the Fair Credit Reporting Act (FCRA) regulates consumer reporting agencies, which are organizations that "assembl[e] or evaluat[e] con-

sumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). FCRA is intended to ensure that these organizations adopt procedures that are "fair and equitable to the consumer." *Id.* § 1681(b). Toward this end, Congress regulated the circumstances in which a consumer reporting agency can furnish a credit report, § 1681b, the contents of credit reports, § 1681c, the measures that must be taken to avoid identify theft, §§ 1681c-1, 1681c-2, and the measures that must be taken to ensure accuracy of credit reports, § 1681e, among other things.

Although the harm of being the victim of an inaccurate credit report is principally economic, Congress did not require consumers to prove economic harm in all circumstances.[2] Rather, it provided for actual damages or statutory damages of between $100 and $1,000 for willful violations. *Id.* § 1681n(a)(1)(A). Therefore, a consumer need not allege financial loss to bring an action under § 1681n. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-06 (6th Cir. 2009) (Sutton, J.); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (Easterbrook, J.). As the Seventh Circuit has explained, "individual losses, if any, are likely to be small—a modest concern about privacy, a slight chance that information would leak out and lead to identify theft." *Murray*, 434 F.3d at 953. "That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury." *Id.*

---

[2] As discussed below, the statute also expressly safeguards the "consumer's right to privacy." 15 U.S.C. § 1681(a)(4).

Thus, in *Beaudry*. the plaintiff alleged that the defendants failed to provide accurate information, namely that they "failed to account for a 2002 change in the numbering used by the Tennessee driver's license system, leading their systems to reflect incorrectly that many Tennessee consumers, including Beaudry, were first-time check-writers." 579 F.3d at 703. The district court dismissed the case because the plaintiff had not alleged monetary loss. Reversing, the Sixth Circuit held that the plaintiff "suffered the precise 'injury' that the statute proscribes: the defendants 'prepare[d] a consumer report' about her but failed to 'follow reasonable procedures to assure maximum possibly accuracy of the information' it contained." *Id.* at 705 (quoting 15 U.S.C. § 1681e(b)). The court further concluded that the statutory damages provision raised no constitutional concerns. *Id.* at 707.

Another example of such a statute is the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692. In enacting the FDCPA, Congress noted the

> abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

Id. § 1692(a). The FDCPA's purpose is, among other things, to "eliminate abusive debt collection practices by debt collectors." *Id.* § 1692(e). The FDCPA regulates debt collectors' communications, both with consumers and third parties, *id.* §§ 1692b, 1692c, 1692d, and the means by which debt collectors collect debts, *id.* § 1692f. It also prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. To en-

force these provisions, § 1692k(a) provides for actual damages, and statutory damages of up to $1,000.

Every circuit to address the issue has concluded that "statutory damages are available without proof of actual damages" under the FDCPA. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir. 1982); *see also Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211-12 (10th Cir. 2006); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 307 (2d Cir. 2003); *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998). And one circuit court has explicitly held that the FDCPA's statutory damages provision is constitutional. *See Robey*, 434 F.3d at 1211-12.

The facts in *Keele* illustrate the importance of allowing recovery for an FDCPA claim without proof of monetary loss. In *Keele*, the named plaintiff wrote an $85.26 check to Wal-Mart for which she had insufficient funds. The law firm Wal-Mart hired to collect the funds sent the plaintiff letters threatening to charge her an illegal $12.50 collection fee on top of a legal $20 service charge. 149 F.3d at 591. On appeal, the defendants argued that the plaintiff lacked standing because she did not pay the $12.50 fee. The court held that Congress intended this fact to be immaterial, reasoning that "the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not." *Id.* at 593-94. Highlighting the difficulties in proof that would be involved if the plaintiff had to prove an actual financial loss, the court noted that it was "far from clear whether the defendants are correct in asserting that [the plaintiff] did not pay the collection fee." *Id.* at 593. Keele paid $20 more than the original $85.26, and the record did not reflect whether some of those funds were retained by the defendants as part of the threatened "illegal collection fee." *Id.* The court

agreed with the district court that it was "unnecessary to decide whether a benefit to [the defendant] was tantamount to actual damage," relying instead on the FDCPA's statutory damages provision. *Id.*

Other consumer-protection statutes in which economic harm would be difficult or burdensome to prove and for which Congress has provided for statutory damages include the Federal Odometer Act, 49 U.S.C. § 32710(a); *see Womack v. Nissan N. Am., Inc.*, 550 F. Supp. 2d 630, 634 (E.D. Tex. 2007) (finding that "Congress' provision for statutory damages [in the Federal Odometer Act] of $1500 per vehicle allows victims to recover without proving actual damages" and that the statutory damages provision is constitutional), the Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B), and the Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a)(2).

2. As common-law defamation claims illustrate, injury may also be difficult to prove when it involves non-pecuniary harms such as invasions of personal privacy, embarrassment, or nuisance. Such harms frequently also follow from violations of consumer-protection statutes. Accordingly, Congress has allowed plaintiffs under such statutes to sue for monetary recoveries based on violations of their statutorily created interests without proof of financial loss.

For example, in enacting the Te[illegible]ne Consumer Protection Act, 47 U.S.C. § 227, Co[illegible]ound that

> (5) Unrestricted telemarketing . . . be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

* * *

> (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991). To enforce its restrictions on telemarketing, Congress created "an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(c)(5). Thus, the "'called party' has standing to bring suit against a person or entity that violates the TCPA, even if the called party has suffered no actual [monetary] harm." *Leyse v. Bank of Am., Nat'l Ass'n*, 2010 WL 2382400, at *3 (S.D.N.Y. June 14, 2010); *see also Landsman & Funk, P.C. v. Lorman Bus. Ctr., Inc.*, 2009 WL 602019, at *3 (W.D. Wis. Mar. 9, 2009) (finding allegation that defendant sent fax to plaintiff in violation of TCPA sufficient basis for standing); *Anderson v. AFNI, Inc.*, 2011 WL 1808779, at *6 (E.D. Pa. May 11, 2011) ("We are satisfied that Anderson has constitutional standing in this case. She has demonstrated an injury in fact—the receipt of nearly fifty calls to her residential telephone number over eight months from an apparently implacable automated caller.")

Another example is the Driver's Privacy Protection Act, 18 U.S.C. § 2724, which states:

> A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom

> the information pertains, who may bring a civil action in a United States district court.

Id. § 2724(a).

As a remedy for a violation of § 2724(a), Congress provided "actual damages, but not less than liquidated damages in the amount of $2,500." *Id.* § 2724(b)(1). Therefore, under the DPPA, "a plaintiff need not prove actual damages to recover liquidated damages." *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1216 (11th Cir. 2005); *see Taylor v. Acxiom Corp.*, 612 F.3d 325, 340-41 (5th Cir. 2010) (Dennis, J., concurring) (reaching standing question majority did not address and concluding that plaintiffs had Article III standing under DPPA); *Cook v. ACS State & Local Solutions, Inc.*, 756 F. Supp. 2d 1104, 1107 (W.D. Mo. 2010); *Parsus v. Cator*, 2005 WL 2240955, at *5 (W.D. Wis. Sept. 14, 2005) ("It is true that plaintiff has not alleged that he suffered injury as a *result* of defendant Kreitlow's obtaining his personal information. However, under the statute, improperly obtaining plaintiff's information *was* an injury.").

As one court stated:

> If Congress's power to define injuries as a method of bestowing standing is to mean anything, the case cannot be dismissed [for failure to show injury]. While these injuries are certainly not garden-variety tort injuries, such is the nature of a statute designed to protect an interest as abstract as personal privacy.

Cook, 756 F. Supp. 2d at 1107.

Other consumer-protection statutes create a statutory right to information, the violation of which is actionable without proof of any further loss. An important example is the Truth in Lending Act (TILA),

which requires disclosure of critical facts to consumers who enter into credit transactions and creates a right of action to obtain either actual or statutory damages (sometimes referred to as penalties) for violations. 15 U.S.C. § 1640(a)(2)(A). As this Court explained in *Mourning v. Family Publications Service Inc.*, 411 U.S. 356 (1973), a consumer's ability to obtain the recovery specified in § 1640(a)(2)(A) where actual damages or entitlement to other measures of recovery are incapable of being proven is of vital importance to carrying out the purposes of TILA:

> In light of the emphasis Congress placed on ... private and administrative enforcement of the Act, we cannot conclude that Congress intended those who failed to comply with regulations to be subject to no penalty or to criminal penalties alone. ... [I]mposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined.

Id. at 376.

Requiring proof of actual damages would impair Congress's intent to provide for enforcement "largely through the institution of civil actions authorized under [§ 1640]." S. Rep. No. 90-392, at 9 (1967). Thus, the courts have agreed that proof of financial loss is not required in a TILA action. *See Edwards v. Your Credit Inc.*, 148 F.3d 427, 441 (5th Cir. 1998) ("[W]hile the harm that Edwards may have suffered is relevant to the damages to which she may be entitled, it is irrelevant to whether she is entitled to bring an action." (citation omitted)); *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982) ("[T]he statutory civil penalties must be imposed for such a violation regardless of the district court's belief that no actual damages resulted or that the violation is *de*

minimis."). The same is true under the informational provisions of the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g). *See Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1231 (D. Nev. 2007) (stating that "[e]very district court to consider the issue has found a plaintiff has standing to pursue a FACTA claim for statutory damages even without showing actual damages" and citing cases).

In addition, Congress has provided for statutory damages to protect non-pecuniary interests in the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3417(a)(1); *Beam v. Mukasey*, 2008 WL 4614324, at *6 (N.D. Ill. Oct. 15, 2008) (finding that the plaintiffs who did not allege financial harm have constitutional and statutory standing under RFPA), the Video Privacy Protection Act, 18 U.S.C. § 2710(c)(2)(a); and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2707(c), 2520(c).

* * *

In short, RESPA is but one of many statutes that provide protection to consumers by creating an actionable statutory entitlement to be free from a particular type of wrongful conduct, and providing a statutory damages remedy that is available without proof of monetary loss or other actual damages. Accepting petitioners' argument that RESPA violates Article III would upset the means of enforcement chosen by Congress for a broad range of consumer-protection laws and significantly impede the objectives of Congress in creating the legally protected interests that those laws incorporate.

II. Permitting RESPA Plaintiffs to Seek Statutory Damages Without Proving Monetary Loss Does Not Undermine the Values of Constitutional Standing.

"Article III standing enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks and alterations omitted). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure ... concrete adverseness ....'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, the "more specific standing requirements"—injury in fact, redressability, and causation—"are simply different descriptions of the same judicial effort to assure, in every case or controversy, 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Sprint Comms. Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008) (quoting *Baker*, 369 U.S. at 204).

RESPA plaintiffs, and plaintiffs under other consumer-protection statutes that similarly permit statutory damages in the absence of proof of monetary loss, have a sufficient personal stake in a case to assure concrete adverseness: (1) A plaintiff's personal participation in a settlement services transaction that violates RESPA is a prerequisite to suit; (2) Congress has found that a consumer's personal participation in such a transaction is likely to result in economic harm to that consumer and to consumers in the aggregate; and (3) because of RESPA's statutory damages provision, a plaintiff has a personal stake in the suit's outcome.

A. Under these circumstances, the concerns that have led this Court to find no constitutional standing in other contexts are not present. First, a RESPA plaintiff's interest in a case is personal, particularized, and concrete. This requirement "preserves the vitality of the adversarial process" because it assures (1) "'that the legal questions presented ... will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,'" and (2) "that the parties before the court have an actual, as opposed to professed, stake in the outcome." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (omission in original) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

A RESPA plaintiff who has proven that she received poor or overpriced service because of a kickback arrangement presents a case no more susceptible to judicial resolution than a plaintiff who seeks statutory damages on account of the fact of the kickback arrangement alone. The legal question in a RESPA case does not depend on the nature or existence of monetary loss. As the Third Circuit stated in *Alston v. Countrywide Financial Corp.*, "RESPA only authorizes suits by individuals who receive a loan accompanied by a kickback or unlawful referral, which is plainly a particularized injury[.]" 585 F.3d 753, 763 (3d Cir. 2009); *see also Beaudry*, 579 F.3d at 705 (finding that the FCRA requirement that a plaintiff be among the injured "poses no obstacle here: Beaudry alleged that she was one of the consumers about whom the defendants were generating credit reports based on inaccurate information due to their failure

to update their databases to accommodate the new Tennessee driver's license number system").

Nor is this injury of an "abstract and indefinite nature—for example, harm to the 'common concern for obedience to law,'" which this Court has found deprives a case of concrete specificity and effectively results in an advisory opinion. *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)). When a RESPA plaintiff shows that she was personally involved in a settlement services transaction involving an illegal kickback arrangement, she has provided a court all the concrete particularity needed to resolve the legal dispute.

Because of RESPA's provision for statutory damages, a plaintiff also has an actual stake in the outcome of the case, and a stake tied specifically to a violation suffered by the plaintiff personally—a stake no different from that of a plaintiff who has proven economic loss. Although an interest in a suit's outcome "unrelated to injury in fact" is insufficient for standing purposes, *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), an interest designed to remedy past violations suffered by the plaintiff personally is sufficient for standing purposes. *Id.* RESPA's statutory damages provision is thus unlike the bounty provided to qui tam relators under the False Claims Act that this Court addressed in *Vermont Agency*. Whereas a qui tam relator's interest in a case is akin to "someone who has placed a wager upon the outcome," *id.* at 772, the statutory damages in RESPA directly redress injury suffered by the plaintiff and function as a substitute for actual damages because the "cost of proving up damages would exceed the damages themselves." *Crabill*, 259 F.3d at 665.

Second, permitting a RESPA plaintiff to seek statutory damages without proving pecuniary loss does not raise separation of powers concerns. "[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Akins*, 524 U.S. at 23; *see also Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) ("The constitutionally mandated standing inquiry is especially important in a case like this one, in which taxpayers seek 'to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.'" (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989)). But RESPA plaintiffs have personal interests in their case that distinguish them from members of the public at large. *See Alston*, 585 F.3d at 763 ("The [RESPA] case before us is not one in which plaintiffs press 'a generalized grievance shared in substantially equal measure by all or a large class of citizens.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *cf. Beaudry*, 579 F.3d at 705 (FCRA "does not authorize suits by members of the public at large; it creates an individual right not to have unlawful practices occur with respect to one's own credit information." (quotation marks and citation omitted)).

Separation of powers concerns associated with constitutional standing are most pronounced when a plaintiff is using the judiciary to enjoin government action. *See Hein*, 551 U.S. at 611-12 (2007) ("The [standing] rule respondents propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials."); *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated

public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.' Art. II, § 3."). This concern is particularly present when a plaintiff is challenging the constitutionality of government action. *See Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other branches of the Federal Government was unconstitutional.").

These concerns are not implicated here. The petitioner's argument that "allowing a plaintiff to pursue a statutory cause of action in the absence of an actual injury would expand judicial and legislative power at the expense of the executive," Pet. Br. 45, is at bottom an argument that consumer-protection statutes should be enforced nearly exclusively by the government. This rule would be a radical departure from Congress's current practice and would weaken Congress's ability to protect consumers' interests.

B. The Constitution is not offended when Congress recognizes the general causal relationship between a statutory violation and significant financial or other consequential harm to consumers, and creates a statutory right the violation of which serves as the requisite actual injury without the necessity of proof that other harm has materialized in the particular transaction at issue. *See Warth v. Seldin*, 422 U.S. at 500 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617

n.3 (1973)); *Massachusetts v. EPA*, 549 U.S. at 516 ("'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment))). This Court has long found constitutional standing under these circumstances in the context of statutory rights to information. *See Akins*, 524 U.S. at 21; *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989). Thus, in *Public Citizen*, the Court recognized that "[a]s when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent [the Federal Advisory Committee Act] allows constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449. In both *Akins* and *Public Citizen*, the plaintiffs' interest in information may also have helped to protect other concrete interests, but the actual harm that followed from the deprivation of information was not determinative of the question of standing, which turned instead on the statutorily created entitlement to information.

The reasons supporting standing where Congress creates a right to information support the recognition of standing based on the deprivation of a statutory right to participate in a settlement services transaction untainted by kickback arrangements. In both contexts, Congress has created an legally protected interest in part to protect other interests (such as consumers' interests in avoiding the higher prices and decreased quality that accompany anticompetitive settlement practices)—but it is the infringement of that statutory interest, not the monetary loss or other injury that may follow, that serves as injury in fact for

standing purposes. *See Rule v. Ft. Dodge Animal Health, Inc.*, 607 F.3d 250, 253-54 (1st Cir. 2010) (noting that "for policy or other reasons, a court might choose to look at injury at some earlier point and ignore later realities").

C. Finally, when considering the constitutionality of RESPA's statutory-damages provision, this Court should bear in mind that courts have traditionally deemed claims made by plaintiffs seeking only statutory damages "to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. at 819 (citation omitted). Congress has long allowed consumers to vindicate their rights through causes of action that do not require showings of monetary damages. And courts have long resolved these disputes. Where this Court has found a tradition of judicial resolution of a type of dispute, it has stated that it would be "unwise for us to abandon history and precedent in resolving the question before us. ... [T]he far more sensible course is to abide by ... history and tradition and find that the [plaintiffs] possess Article III standing." *Sprint*, 554 U.S. at 288-89 (holding that assignees had Article III standing to bring claims arising from payphone operators' injuries); *see also Vt. Agency*, 529 U.S. at 774 (looking at history of qui tam actions and finding it "particularly relevant to the constitutional standing inquiry). Petitioners have provided this Court no compelling reason to abandon its traditional willingness to hear claims of this nature.

CONCLUSION

The Court should hold that respondent has Article III standing to pursue her RESPA claim and affirm the judgment of the court of appeals.

Respectfully submitted,

SCOTT L. NELSON
Counsel of record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Counsel for Amici Curiae

October 2011

AMICUS CURIAE BRIEF

No. 10-708

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
Successor in Interest to the First American Corporation,
and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and
on Behalf of All Others Similarly Situated,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF ACA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

TOMIO B. NARITA
Counsel of Record
JEFFREY A. TOPOR
R. TRAVIS CAMPBELL
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, California 94104
Telephone: (415) 283-1000
Facsimile: (415) 352-2625
tnarita@snllp.com
*Attorneys for Amicus Curiae
ACA International*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. Consumers Who Have Been Subjected To Collection Abuses Proscribed By The FDCPA May Recover Actual Damages, "Additional Damages" Allowed By The Court, And Costs And Reasonable Attorneys' Fees	4
II. Circuit Courts Have Consistently Permitted Consumers To Recover Statutory "Additional Damages" Under The FDCPA Even In The Absence Of Any Actual Damage	7
III. A Consumer Who Suffers No Actual Damage As A Result Of An FDCPA Violation Cannot Demonstrate "Injury In Fact" And Lacks Standing To Sue Under Article III	9
IV. By Ignoring Or Misconstruing This Court's Standing Requirements, Courts Have Reached Absurd Results In FDCPA Cases	12
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Baker v. G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982) 7

Carroll v. Wolpoff & Abramson, 53 F.3d 626 (4th Cir. 1995) 8

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 11

Danow v. Law Office of David E. Borback, P.A., 634 F. Supp. 2d 1337 (S.D. Fla. 2009) 13

Emanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989) 13

Gardisher v. Check Enforcement Unit, Inc., No. 1:00-cv-401, 2003 WL 187416 (W.D. Mich. Jan. 22, 2003) 13

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 11

Guerrero v. RJM Acquisitions, LLC, 499 F.3d 926 (9th Cir. 2007) 5

Harper v. Better Bus. Servs, Inc., 961 F.2d 1561 (11th Cir. 1992) 8

Herrera v. LCS Fin. Servs. Corp., ___ F.R.D. ___, 2011 WL 2149084 (N.D. Cal. June 1, 2011) 14

Irwin v. Mascott, 96 F. Supp. 2d 968 (N.D. Cal. 1999) 14

Jerman v. Carlisle, McNellie, et al., ___ U.S. ___, 130 S. Ct. 1605 (2010) 3, 5

TABLE OF AUTHORITIES – Continued

Page

Jerman v. Carlisle, McNellie, et al., No. 1:06-cv-1397-PAG, 2011 WL 1434679 (N.D. Ohio Apr. 14, 2011) 12

Jerman v. Carlisle, McNellie, et al., No. 1:06-cv-1397-PAG (N.D. Ohio) (Docket No. 62-1) 13

Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) 8

Kuhn v. Account Control Tech., Inc., 865 F. Supp. 1443 (D. Nev. 1994) 14

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 10, 11

Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003) 8

Nelson v. Select Fin. Servs., Inc., No. Civ. A. 05-3473, 2006 WL 1672889 (E.D. Pa. June 6, 2006) 13

Raines v. Byrd, 521 U.S. 811 (1997) 10

Robey v. Shapiro, Marianos & Cejda, LLC, 434 F.3d 1208 (10th Cir. 2006) 8

Rockwell v. Talbott, Adams & Moore, Inc., No. 8:04cv24, 2006 WL 436041 (D. Neb. Feb. 21, 2006) 13

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 9, 11

Summers v. Earth Island Inst., 555 U.S. 488, 129 S. Ct. 1142 (2009) 11

TABLE OF AUTHORITIES – Continued

Page

Tourgeman v. Collins Fin. Servs., Inc., No. 08-cv-1392 JLS (NLS), 2011 WL 3176453 (S.D. Cal. July 26, 2011) 14

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 9, 10, 11

Warth v. Seldin, 422 U.S. 490 (1975) 9, 10

FEDERAL STATUTES

Fair Debt Collection Practices Act
15 U.S.C. §§ 1692 *et seq.* ..... *passim*
15 U.S.C. § 1692(a) 4
15 U.S.C. § 1692c(a)(1) 4
15 U.S.C. § 1692d(1) 5
15 U.S.C. § 1692d(2) 5
15 U.S.C. § 1692e 4, 7
15 U.S.C. § 1692e(2)(A) 4
15 U.S.C. § 1692g 5, 7, 14
15 U.S.C. § 1692i 5
15 U.S.C. § 1692k 3, 6
15 U.S.C. § 1692k(b) 6

OTHER AUTHORITIES

U.S. Const. art. III, § 2 9

INTEREST OF *AMICUS CURIAE*

ACA International ("ACA") is a non-profit corporation founded in 1939 based in Minneapolis, Minnesota. ACA is an association of credit, collection and debt purchasing professionals who provide a variety of accounts receivable management services. ACA's interests in this matter are both public and private.[1]

ACA represents approximately 5,000 third-party collection agencies, asset buyers, attorneys, credit grantors, and their vendor affiliates. Members include sole proprietorships, partnerships, and corporations ranging from small businesses to firms employing thousands of workers. The membership includes 3,000 third-party debt collection companies, 650 credit grantors, 225 asset buyers, 200 vendor affiliates, and over 850 in-house, compliance, defense or collection attorneys.

Together, ACA members employ nearly 150,000 collectors. These members include the very smallest of businesses that operate within a limited geographic range of a single state, and the very largest of multinational corporations that operate in every state and non-U.S. jurisdictions. Approximately half

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was filed on July 11, 2011.

of the debt collection company members of ACA have fewer than ten employees. Many are wholly or partially owned or operated by minorities or women. ACA helps its members serve their communities and meet the challenges created by changing markets through leadership, education, and service.

Through their attempts to recover outstanding accounts, ACA members act as an extension of every community's businesses. Members of ACA represent the local hardware store, the retailer down the street, and the family doctor. ACA members work with these businesses, large and small, to obtain payment for the goods and services received by consumers, and each year, the combined effort of ACA members results in the recovery of billions of dollars that are returned to business and reinvested in local communities. Without an effective collection process, the economic viability of these businesses, and by extension, the local and national economies in general are threatened. At the very least, absent effective collections, citizens would be forced to pay inflated prices to compensate for uncollected debts.

Finally, ACA members also assist governmental bodies in recovering unpaid obligations, a function that is increasingly important as many of our government clients face record budget deficits.

SUMMARY OF ARGUMENT

ACA writes separately to urge the Court to clarify an issue of vital importance to its members: namely, that Congress cannot create Article III standing for consumers simply by passing a law that allows them to pursue statutory damage claims. Rather, consumers must allege and prove they have suffered "injury in fact" to establish their standing. In the context of consumer protection statutes, this means consumers must plead and prove they have suffered "actual damages" resulting from the statutory violation in order to have standing.

ACA members are governed by several federal statutes, most notably the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. §§ 1692, *et seq.* As written, the FDCPA prohibits a variety of collection abuses and allows aggrieved consumers to seek actual damages, statutory damages, attorneys' fees and costs. *See id.* at § 1692k. Although thousands of FDCPA lawsuits are filed in federal courts each year, many of the plaintiffs neither plead nor seek to prove that they have suffered any actual damages as a result of the alleged violation. Nonetheless, courts across the country have allowed consumers to pursue FDCPA claims that have caused no actual harm, helping give rise to what has been referred to as a "cottage industry" of litigation based on "technical violations of federal law" driven solely by the pursuit of attorneys' fees. *See Jerman v. Carlisle, McNellie, et al.*, ___ U.S. ___, 130 S. Ct. 1605, 1631 (2010) (Kennedy, J., dissenting).

ACA joins the Petitioners in urging the Court to reverse the decision of the Ninth Circuit. ACA requests that the Court clarify that consumers must plead and prove they have suffered actual damages resulting from a violation of a consumer protection statute in order to establish standing to sue under Article III of the Constitution.

ARGUMENT

I. Consumers Who Have Been Subjected To Collection Abuses Proscribed By The FDCPA May Recover Actual Damages, "Additional Damages" Allowed By The Court, And Costs And Reasonable Attorneys' Fees

Congress passed the FDCPA in 1977 to combat "abusive, deceptive and unfair collection practices" by debt collectors, and to insure that collectors who refrain from such improper practices were not placed at a competitive disadvantage. *See* 15 U.S.C. § 1692(a), e.

> Among other things, the Act prohibits debt collectors from making false representations as to a debt's character, amount, or legal status, § 1692e(2)(A); communicating with consumers at an unusual time or place likely to be inconvenient to the consumer, § 1692c(a)(1); or using obscene or profane

> language or violence or the threat thereof, §§ 1692d(1), (2).

Jerman, 130 S. Ct. at 1608-09 (internal quotation marks omitted). The statute obligates collectors to provide consumers with notice of their right to dispute a debt or any portion thereof, and it restricts the permissible venues for legal actions on the debt. *See* 15 U.S.C. §§ 1692g, 1692i. The focus of the Act is to prevent deceptive and intimidating conduct by collectors that can seriously "disrupt a [consumer's] life":

> Congress was concerned with disruptive, threatening, and dishonest tactics. The Senate Report accompanying the Act cites practices such as 'threats of violence, telephone calls at unreasonable hours [and] misrepresentation of consumer's legal rights.' . . . **In other words, Congress seems to have contemplated the type of actions that would intimidate unsophisticated individuals and which, in the words of the Seventh Circuit, 'would likely disrupt a [consumer's] life.'** . . .

Guerrero v. RJM Acquisitions, LLC, 499 F.3d 926, 938-39 (9th Cir. 2007) (emphasis added; internal citations omitted).

The remedies provided by the Act include actual damages, additional damages, costs and attorneys' fees. Specifically, in the case of an individual action under the statute, the FDCPA provides as follows:

> (a) Amount of damages. Except as otherwise provided by this section, any debt collector

> who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of – (1) any actual damage sustained by such person as a result of such failure; (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; . . . . and (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. . . .

15 U.S.C. § 1692k. When a court considers whether to award "additional damages," the statute requires it to assess a series of factors:

> (b) Factors considered by court. In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors – (1) in any individual action under subsection (a)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional; . . . .

Id. at § 1692k(b).

II. Circuit Courts Have Consistently Permitted Consumers To Recover Statutory "Additional Damages" Under The FDCPA Even In The Absence Of Any Actual Damage

Numerous circuit courts have held that a plaintiff may recover statutory damages under the FDCPA even if the plaintiff fails to allege or prove any actual damages resulting from the violation. Most courts have reached this conclusion without addressing the decisions of this Court governing standing.

In *Baker v. G.C. Servs. Corp.*, 677 F.2d 775 (9th Cir. 1982), the plaintiff challenged the contents of a collection letter. The district court held that the letter violated sections 1692e and 1692g of the FDCPA, but determined that the plaintiff had suffered no actual damages. *See id.* at 777. Despite the lack of actual damages, the district court awarded the plaintiff $100 in statutory damages, plus attorneys' fees. *See id.* The Ninth Circuit affirmed, noting there is "no indication in the statute that [an] award of statutory damages must be based on proof of actual damages." *Id.* at 780. *Baker* never addressed whether a consumer who had neither alleged nor proved actual damages stemming from an FDCPA violation possessed standing under Article III.

Following *Baker*, numerous circuit courts have held that plaintiffs may pursue claims for statutory damages under the FDCPA without proving any actual damages, and they have reached this conclusion without addressing this Court's Article III

standing jurisprudence. *See, e.g., Keele v. Wexler*, 149 F.3d 589, 593-94 (7th Cir. 1998) ("The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages. In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not.") (citations omitted); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 307 (2d Cir. 2003) (fact that plaintiff did not pay attorneys' fees "does not necessarily suggest that he was not injured for purposes of his FDCPA claim, if he can show that [the law firm defendant] *attempted* to collect money in violation of the FDCPA"); *Carroll v. Wolpoff & Abramson*, 53 F.3d 626, 629 (4th Cir. 1995) (affirming award of $50 in statutory damages and $500 in fees; plaintiff abandoned actual damages claim); *Harper v. Better Bus. Servs, Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992) (affirming award of statutory damages and attorneys' fees where plaintiff "offered no proof of actual damages.").

At least one circuit considered the Article III issue directly, and held that consumers who suffer no actual damages still have standing to sue under the FDCPA based upon their claim for statutory damages. *See Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1212 (10th Cir. 2006) (the FDCPA "permits the recovery of statutory damages up to $1,000 in the absence of actual damages" and plaintiff with no actual damages satisfied the "injury in fact" requirements of constitutional standing).

III. A Consumer Who Suffers No Actual Damage As A Result Of An FDCPA Violation Cannot Demonstrate "Injury In Fact" And Lacks Standing To Sue Under Article III

ACA respectfully submits that in the context of the FDCPA and other consumer protection statutes, a consumer cannot demonstrate "injury in fact" without alleging and proving that he has suffered actual damages resulting from the violation. Article III of the United States Constitution limits the judicial authority of the federal courts to "cases" and "controversies." *See* U.S. Const. art. III, § 2; *see also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (the existence of a "case" or "controversy" is a "bedrock requirement" of federal court jurisdiction); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies.").

The "standing" doctrine ensures that only true "cases or controversies" can proceed in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (standing is "a threshold issue in every federal case, determining the power of the court to entertain the suit.").

The "irreducible constitutional minimum" requirements of standing include proof that the plaintiff has suffered "injury in fact" as a result of the unlawful conduct – meaning the plaintiff suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

The "injury in fact" test for standing "requires more than an injury to a cognizable interest. **It requires that the party seeking review be himself among the injured.**" *Id.* at 563 (emphasis added); *see also Raines v. Byrd*, 521 U.S. 811, 819 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a personal stake in the alleged dispute, **and that the alleged injury suffered is particularized as to him.**") (emphasis added); *Warth*, 422 U.S. at 498 ("The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. **A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action. . . .**") (emphasis added); *Valley Forge*, 454 U.S. at 473 (Article III's standing requirements prevent "the conversion of courts of the United States into judicial versions of college debating forums.").

The party invoking federal jurisdiction bears the burden of establishing the standing requirements for

each type of relief he seeks. *See Lujan*, 504 U.S. at 561; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1149 (2009) (the plaintiff "bears the burden of showing that he has standing for each type of relief sought."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-12 (1983) (plaintiff with standing to pursue damages based on police use of illegal chokehold lacked standing to seek injunction banning use of the same chokehold).

Congress can enact statutes that provide consumers with a new cause of action, but Congress does *not* have the power to eradicate Article III's minimum standing requirements. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself . . . that is likely to be redressed if the requested relief is granted.") (quotation marks omitted); *see also Summers*, 129 S. Ct. at 1151 ("Unlike redressability, however, **the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute**.") (emphasis added); *Valley Forge*, 454 U.S. at 488, n.24 ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Simon*, 426 U.S. at 39 ("broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.") (citation omitted). To

the extent that decisions of the circuit courts have suggested that the FDCPA allows a plaintiff to pursue a claim without showing injury in fact, they should be expressly disapproved.

IV. By Ignoring Or Misconstruing This Court's Standing Requirements, Courts Have Reached Absurd Results In FDCPA Cases

The lax standing rules employed by courts in FDCPA cases have led to a tsunami of "no injury" lawsuits that have flooded federal courts across the country. These cases often have absurd endings, where the uninjured consumer recovers nominal statutory damages – or nothing at all – while the attorney is awarded tens of thousands of dollars in fees for "vindicating" a technicality. ACA submits that clarity from this Court is needed on the important standing issue raised here.

For example, for the past five years, the parties in *Jerman* have been litigating whether the words "in writing" should be included in a collector's section 1692g letter. After this Court remanded the case, the parties filed cross-motions for summary judgment, and the district court held that the plaintiff and the class were entitled to zero actual damages and zero statutory damages. *See Jerman v. Carlisle, McNellie, et al.*, No. 1:06-cv-1397-PAG, 2011 WL 1434679, at *10 (N.D. Ohio Apr. 14, 2011). Undeterred by this result, counsel for plaintiff filed a motion seeking a whopping $343,411.79 in attorneys' fees and costs,

arguing that the action was successful because plaintiff "obtained judgment" on the claim. *See Jerman v. Carlisle, McNellie, et al.*, No. 1:06-cv-1397-PAG (N.D. Ohio) (Docket No. 62-1).

Incredibly, under current law, counsel in *Jerman* theoretically could recover some fees. One circuit court has held that even if an FDCPA plaintiff proves *zero* actual damages and *zero* statutory damages, he may still recover fees and costs. *See Emanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir. 1989) (plaintiff entitled to fees and costs even though he was "not deserving of actual damages" and "should not receive any 'additional damages' ").

Unfortunately, the *Jerman* case is hardly an anomaly. FDCPA plaintiffs who have failed to prove any actual damages are routinely awarded significant attorneys' fees to compensate their efforts. *See, e.g., Danow v. Law Office of David E. Borback, P.A.*, 634 F. Supp. 2d 1337, 1345 (S.D. Fla. 2009) (jury awarded zero actual damages and $1,000 in statutory damages; court awarded fees of $62,895.00); *Nelson v. Select Fin. Servs., Inc.*, No. Civ. A. 05-3473, 2006 WL 1672889, at *1, 4 (E.D. Pa. June 6, 2006) (where a single phrase in one letter violated FDCPA, plaintiff recovered zero actual damages, $1,000 in statutory damages and $24,693.80 in fees); *Gardisher v. Check Enforcement Unit, Inc.*, No. 1:00-cv-401, 2003 WL 187416, at *7 (W.D. Mich. Jan. 22, 2003) (zero actual damages, $1,000 in statutory damages, and $69,872.00 in fees); *Rockwell v. Talbott, Adams & Moore, Inc.*, No. 8:04cv24, 2006 WL 436041, at *1-3 (D. Neb. Feb.

21, 2006) (jury awarded zero actual damages and $250 in statutory damages; court awarded fees of $5,075).

Additionally, uninjured plaintiffs often serve as class representatives in FDCPA class actions. Indeed, even where there is no evidence that the class representative or class members ever read or received the collection letters they are challenging, courts have held that "actual receipt" of the letter is "irrelevant to liability" under the FDCPA. *See, e.g., Tourgeman v. Collins Fin. Servs., Inc.*, No. 08-cv-1392 JLS (NLS), 2011 WL 3176453, at *3-5 (S.D. Cal. July 26, 2011) (denying motion to dismiss class representative's claim: "if a consumer's claim is based on misstatements or micharacterizations in a letter from a debt collector, whether the consumer received the letter is irrelevant."); *Herrera v. LCS Fin. Servs. Corp.*, ___ F.R.D. ___, 2011 WL 2149084, at *7 (N.D. Cal. June 1, 2011) (certifying FDCPA class: "the simple act of mailing letters with allegedly misleading information constitutes a use of such prohibited language, and actual receipt is irrelevant to liability under the FDCPA.") (citation and quotation marks omitted); *Irwin v. Mascott*, 96 F. Supp. 2d 968, 976 (N.D. Cal. 1999) ("A debt collector violates the FDCPA by sending a notice containing unlawful provisions. Whether the notice is received is irrelevant to the issue of liability."); *see also Kuhn v. Account Control Tech., Inc.*, 865 F. Supp. 1443, 1450 (D. Nev. 1994) (granting summary judgment for consumer on section 1692g claim: "ACT's argument that Kuhn never received the

letter or did not read it is of no moment on the issue of whether a violation has occurred.").

In order to reverse this onslaught of "no injury" lawsuits that are clogging the nation's courts and draining the resources of collection professionals, ACA respectfully urges the Court to clarify that a consumer must plead and prove actual damages to establish standing under consumer protection statutes like the FDCPA.

CONCLUSION

For all of the foregoing reasons, ACA respectfully submits that the decision of the Ninth Circuit should be reversed.

Dated: August 26, 2011

Respectfully submitted,

TOMIO B. NARITA
Counsel of Record
JEFFREY A. TOPOR
R. TRAVIS CAMPBELL
SIMMONDS & NARITA LLP
44 Montgomery Street,
Suite 3010
San Francisco, California
94104
Telephone: (415) 283-1000
Facsimile: (415) 352-2625
tnarita@snllp.com
Attorneys for Amicus Curiae
ACA International

AMICUS CURIAE BRIEF

RECEIVED
AUG
DENIED

No. 10-708

IN THE
Supreme Court of the United States

THE FIRST AMERICAN CORPORATION AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE EDWARDS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN BANKERS ASSOCIATION, AMERICAN ESCROW ASSOCIATION, COMMUNITY MORTGAGE BANKING PROJECT, CONSUMER BANKERS ASSOCIATION, CONSUMER MORTGAGE COALITION, THE FINANCIAL SERVICES ROUNDTABLE, HOUSING POLICY COUNCIL, MORTGAGE BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF REALTORS® AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
DAVID L. PERMUT
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000
Counsel for *Amici Curiae*

August 29, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or An Allegedly Impartial Referral 7

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs 7

B. RESPA Does Not Create A Cause of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral 10

C. The Court Of Appeals Misconstrued Section 2607(d)(2) 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: **PAGE**

Ashwander v. TVA,
297 U.S. 288 (1936) 5

Camreta v. Greene,
131 S. Ct. 2020 (2011) 4

Capell v. Pulte Mtge. L.L.C., No. 07-1901,
2007 U.S. Dist. LEXIS 82570
(E.D. Pa. Nov. 7, 2007) 10

Carter v. Welles-Bowen Realty, Inc.,
553 F.3d 979 (6th Cir. 2009) 10, 11, 15, 17

Carter v. Welles-Bowen Realty, Inc.,
719 F. Supp. 2d 846 (N.D. Ohio 2010) 14

Citizens United v. FEC,
130 S. Ct. 876 (2010) 5

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) 5

Finley v. United States, 490 U.S. 545 (1989) 18

Haug v. Bank of America,
317 F.3d 832 (8th Cir. 2003) 8

Kahrer v. Ameriquest Mtge. Co.,
418 F. Supp. 2d 748 (W.D. Pa. 2006) 17

Kruse v. Wells Fargo Home Mortg., Inc.
383 F.3d 49 (2d. Cir. 2004) 8

Robinson v. Fountainhead Title Group Corp.,
447 F. Supp. 2d 478 (D. Md. 2006) 17

Santiago v. GMAC Mortg. Group, Inc.,
417 F.3d 384 (3d. Cir. 2005) 8

Snow v. First Am. Title Ins. Co.,
332 F.3d 356 Cir. 2003 19

Stern v. Marshall,
131 S. Ct. 2594 (2011) 5

STATUTES:

Dodd-Frank Wall Street Reform and
Consumer Protection Act, Pub. L. No.11-
203, § 1098(7)(B), 124 Stat 1376 19

Fair Credit Reporting Act,
15 U.S.C. § 1681n(a) & (b) 18

Fair Debt Collection Practices Act
15 U.S.C. § 1692k(a) 18

Real Estate Settlement Procedures Act of
1974, 12 U.S.C. §§ 2601-2617

12 U.S.C. § 2601(b)(2) 6, 7, 9, 18
12 U.S.C. § 2605 19
12 U.S.C. § 2607 ..... 8, 12 19
12 U.S.C. § 2607(a) 8, 11, 17
12 U.S.C. § 2607(b) 17
12 U.S.C. § 2607(c) 11
12 U.S.C. § 2607(c)(1)(b) 14
12 U.S.C. § 2607(c)(2) 8, 11
12 U.S.C. § 2607(c)(3) 11
12 U.S.C. § 2607(c)(4) 12, 13
12 U.S.C. § 2607(c)(5) 13
12 U.S.C. § 2607(d) 6
12 U.S.C. § 2607(d)(2) ..... *passim*
12 U.S.C. § 2607(d)(4) 7, 19
12 U.S.C. § 2614 19
12 U.S.C. § 2617 19

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974) 17

Truth in Lending Act of 1968, 15 U.S.C. § 1640(a) 18

CONSTITUTION:

U.S. Const. Art. III 4, 6

RULES AND REGULATIONS:

24 C.F.R. § 3500, App. B. 9

24 C.F.R. § 3500.14 8

24 C.F.R. § 3500.14(g)(2) 8, 11

HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements. 14

Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) 13

Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996) 15

LEGISLATIVE HISTORY:

H.R. Rep. No. 97-532 (1982) 11, 15

H.R. Rep. No. 98-123 (1983) 18

INTEREST OF THE *AMICI CURIAE*[1]

Amici represent the full spectrum of participants in the residential mortgage industry who are subject to RESPA, from mortgage companies to mortgage brokers, commercial banks, thrifts, title insurers and agents, homeowners insurance providers, real estate agents, settlement agents, and settlement service providers of all kinds. Although many of these companies are small and hence local, many others operate regionally and/or nationally. *Amici* and their members have a strong interest in the construction and application of the laws governing the mortgage lending industry.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. Its members are banks of all sizes and types, including national and state chartered banks; community, regional, and money center banks and holding companies; savings banks and associations; and trust companies. Member banks of the ABA are located in each of the 50 states and the District of Columbia, and collectively they account for approximately 90% of the domestic assets of the banking industry in the United States.

---

[1] The parties have consented the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

The American Escrow Association is a national association of real estate settlement agents. It acts on behalf of professionals conducting all types of settlement practices throughout the United States. Its goals are to further the knowledge and professionalism of settlement agents and to educate and advise decision makers at the national level on issues of consequence to the settlement industry as a whole.

The Consumer Bankers Association ("CBA") is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Community Mortgage Banking Project is a public policy organization representing the interests of independent mortgage bankers. The Project supports legislative and regulatory reform of the mortgage market that promote consumer access, borrower and investor transparency, local competition and choice, and a value added mortgage chain.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan

information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies account directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs. The Roundtable's Housing Policy Council is made up of thirty-two companies that are among the nation's leaders in mortgage finance. Member companies originate seventy-five percent of the mortgages for American home buyers and provide mortgage insurance and servicing to the majority of American home owners.

The Mortgage Bankers Association (MBA) is a national association representing the real estate finance industry. It has over 2,200 members comprised of real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to ensure the continued strength of the nation's residential and commercial real estate markets, to expand

homeownership, and to extend access to affordable housing to all Americans. It promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications.

The National Association of Realtors® is the country's largest membership organization for residential and commercial real estate agents. It provides ongoing research and education programs for its members' professional development, advocates for laws and policies that support the right to own, use, and transfer real property, and develops and promotes standards for efficient, effective, and ethical real estate business practices.

SUMMARY OF ARGUMENT

1. *Amici* are aware that the Court granted certiorari only on the second question presented in the Petition – whether a purchaser of real estate settlement services has Article III standing to sue under the Real Estate Settlement Protection Act ("RESPA") in the absence of any claim that the alleged violation of the Act affected the price, quality, or other characteristics of the settlement services provided. *Amici* endorse Petitioners' argument that Respondent lacks constitutional standing because she has failed to allege any actual injury.

Amici are also aware of the Court's settled practice of declining to reach a constitutional issue if a case may decided on nonconstitutional grounds. *See, e.g. Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("[The] 'longstanding principle of judicial restraint requires that courts avoid reaching

constitutional questions in advance of the necessity of deciding them.'") (quoting *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988)); *Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring) ("The Court will not * * * decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (citations and internal quotation marks omitted)); *Citizens United v. FEC*, 130 S. Ct. 876, 918 (2010) (Roberts, C.J., concurring) ("Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. [Citing *Ashwander*.] This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.") (inner quotation and citations omitted). *See also, e.g., Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) ("[W]e will, where possible, construe federal statutes so as 'to avoid serious doubt of their constitutionality.") (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841, (1986)). "Where such 'serious doubts' arise, a court should determine whether a construction of the statute is 'fairly possible' by which the constitutional question can be avoided." *Schor*, 478 U.S. at 841 (citing *Crowell* v. *Benson*, 285 U.S. 22 (1932)). Indeed, "'this Court will often strain to construe legislation so as to save it against constitutional attack,'" although it "'will not carry this to the point of perverting the purpose of a statute' or judicially rewriting it.'" *Id.* (quoting *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964)).

Amici believe that, *without* straining, the Court can construe RESPA to avoid Article III standing issues. Accordingly, in the event that the Court, or one or more of its members, may in the end wish to resolve this case on statutory rather than constitutional grounds, *Amici* show in this brief that RESPA itself denies standing to a purchaser of real estate settlement services who has no claim that the alleged violation caused him or her actual harm.

2. The decision below was wrongly decided because the court of appeals appears to have believed that RESPA bars exclusive referral agreements. Instead RESPA bars only referral agreements based on kickbacks or the giving of another "thing of value," the presence of which will "increase unnecessarily the costs" of the settlement service being provided. 12 U.S.C. § 2601(b)(2). Because RESPA actually permits exclusive referral agreements, the courts that have ruled that RESPA confers on consumers a right to "impartial" referrals are incorrect. The Act confers only a right to referrals untainted by kickbacks that unnecessarily increase settlement costs, and therefore creates a private cause of action only when the price of the referred service is increased because of the kickback – that is, when the plaintiff actually suffers economic injury.

The court of appeals reached the wrong result in this case not only because it failed to appreciate the role of the kickback in the statutory scheme but also because it relied instead on, and misconstrued, the language of RESPA's damages provision, § 2607(d), as amended in 1983. The 1983 amendment did not change RESPA's precisely focused purpose of

protecting consumers from kickbacks that tend to "increase unnecessarily the costs" of settlement services (§ 2601(b)(2)), and did not create a new private RESPA cause of action for non-financial harm. While federal and state regulators are expressly empowered by the Act to seek injunctive relief against alleged violations thought to be anticompetitive (*see* § 2607(d)(4)), private plaintiffs have no enforcement role to play in cases where the conduct complained of causes them no actual injury.

ARGUMENT

I.

RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or The Denial of An Impartial Referral

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs.

Congress passed RESPA to save consumers money: "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result * * * in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

Kickbacks obviously do "tend to increase unnecessarily the costs" to consumers because the service provider who pays a kickback in exchange for the referral often treats the kickback as a cost of

doing business, which it passes on to the consumer in the form of unnecessarily higher fees.

The statute refers to "fees" and "things of value" as well as kickbacks. It says that no person shall give "any fee, kickback, or thing of value pursuant to any agreement * * * that * * * a real estate settlement service * * * shall be referred to any person." § 2607(a). But the "fee" or "thing of value" must be in the nature of a kickback to create a private cause of action; *i.e.*, it must increase the service provider's cost of doing business and lead to unnecessarily higher fees to the consumer. Indeed, § 2607(c)(2) exempts "the payment * * * of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." A "reasonable relationship" test is used to determine whether a payment is bona fide: "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods." 24 C.F.R. § 3500.14. That is, the "excess" portion of the payment could represent a kickback that unnecessarily increased settlement costs.[2]

---

[2] The Department of Housing and Urban Development has stated that the failure of the payment of a thing of value to pass the reasonable relationship test "may be used as evidence of a violation of Section [2607] and may serve as a basis of a RESPA investigation." 24 C.F.R. § 3500.14(g)(2). Nevertheless, "[h]igh prices standing alone are not proof of a RESPA violation." *Id.* Courts have consistently held that § 2607 of RESPA is not a price control provision. *E.g.*, *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d. Cir. 2005); *Kruse v. Wells Fargo Home Mortg., Inc.* 383 F.3d 49 (2d. Cir. 2004); *Haug v. Bank of America*, 317 F.3d 832 (8th Cir. 2003).

Plaintiff recognizes that she must allege a kickback to recover: she says that First American overpaid for its 17 percent interest in Tower City. Pet. App. 51a-52a. Her theory is that First American in effect paid an advance kickback. Thus, instead of saying to Tower City, "I'll give you $10 for every consumer you refer to me," First American is alleged to have said something like, "Here's $100 in exchange for ten future referrals." *See id.*

The Department of Housing and Urban Development ("HUD") has also recognized the need to show a cost-increasing kickback as a predicate to establishing a violation. Its regulations cite, as an example of a RESPA violation, the situation in which A gives settlement services at a discounted rate to B, a builder, in return for B's agreement to refer home purchasers to A. 24 C.F.R. 3500, App. B. The necessary implication is that A will make up the discount by increasing its charge to home purchasers – and that, if A charged full price to B, there would be no violation even if as part of the transaction B had agreed to make the referrals.

In short, for RESPA to be violated, A must give B something undeserved, in the nature of a kickback, for in that instance A will ordinarily look to recover what it gave to B and will tend to do so through higher fees to its customers – *i.e.*, through an overcharge. That's what Congress meant to protect against: settlement service costs that are "unnecessarily increase[d]" by the presence of kickbacks. § 2601(b)(2).

B. RESPA Does Not Create A Cause Of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral.

Although a kickback would be expected in most cases ultimately to increase the price to the consumer, some settlement service fees are government-regulated (prohibiting the provider from raising the price) and in other instances a provider may choose not to increase the price to the consumer. In these cases the courts have considered alleged kickbacks that result in no harm, with different results.

Some courts that construe RESPA to provide a private right of action for a kickback scheme that results in no harm to the consumer hold that RESPA protects not only against referrals that unnecessarily increase costs because of kickbacks, but also against referrals that, because of the presence of a kickback – even one that does not increase costs – are not "impartial." *See Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 987 (6th Cir. 2009) (cited and relied on by the court below, Pet. App. 7a); *Capell v. Pulte Mtge. L.L.C.*, No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *5 (E.D. Pa. Nov. 7, 2007).

The court of appeals in this case never clearly identified what it considered to be the RESPA violation at issue, but it appears to have agreed with the *Carter* line of cases in accepting Respondent's claim "that her title insurance was referred to First American pursuant to an exclusive agency agreement, which * * * was illegal under RESPA." Pet. App. 3a.

To support the proposition that RESPA creates a right to impartial referrals, *Carter* and cases like it point to a House Report accompanying the 1983 RESPA amendments. *Carter*, 553 F.3d at 987; *see also* Pet. App. 6a. The Report voiced a concern about "affiliated business arrangements," under which referrals might be made without the explicit payment of kickbacks or similar fees, and lamented that the advice of the referrer in such an arrangement "may lose its impartiality" and reduce the "healthy competition generated by independent settlement service providers." H.R. Rep. No. 97-532, at 52 (1982). From that Report these courts erroneously infer that RESPA itself creates a private cause of action "for harm to consumers beyond an increase in the cost of settlement services"; *i.e.*, that § 2607(a) "allows individuals to police the marketplace in order to ensure impartiality of referrals and competition between settlement service providers." *Carter*, 553 F.3d at 987, 988 (quoting *Capell*, 2007 U.S. Dist. LEXIS 82570, at *1).

The inference is erroneous because in fact Congress did not ban referrals that are not "impartial." On the contrary, the exemptions to liability provided in § 2607(c) show that partial referrals are permitted. We have already seen that § 2607(c)(2) exempts "any payment * * * for goods or facilities actually furnished or for services actually performed," and that HUD interprets that section to exempt payments that are reasonably related to the value of goods, facilities or services furnished – regardless of whether the referral of a settlement service is "impartial." 24 C.F.R. § 3500.14(g)(2). In addition, § 2607(c)(3) expressly exempts "payment pursuant to cooperative broker and *referral*

arrangements or agreements between real estate agents and brokers." (Emphasis added.) And § 2607(c)(4) exempts affiliated business arrangements – which may include exclusive referral agreements – provided only that (i) the consumer is not required to use any particular settlement service provider; (ii) the referrer advises the consumer of the existence of the affiliated business arrangement and provides a timely estimate of the service fees to be charged; and (iii) the company in the arrangement holding an interest in the other company receives nothing more than a return on its ownership interest – *i.e.*, no kickbacks to unnecessarily increase costs. *See* § 2607(c)(4).

Moreover, notwithstanding the qualifications for the § 2607(c)(4) exemption just listed, that section explicitly permits a lender to require the use of an "attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest" in the transaction. Hence that provision permits an exclusive referral arrangement that the consumer is actually required to accept.

Section 2607(c)(4) was enacted as part of the same 1983 Amendments that, according to the court below, created a broadly enforceable right to impartial referrals. But Congress' sanction of referrals to affiliated businesses through an exemption to the anti-kickback and fee splitting provisions of § 2607 contradicts the notion that the 1983 Amendments were intended to create a private cause of action

targeted at impartial referrals *per se*, regardless of consumer harm.[3]

Further, HUD has issued a policy statement that expressly recognizes that exclusive referrals are permissible under RESPA. Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 *et. seq.* (June 7, 1996). HUD explained that lawful controlled business arrangements under § 2607(c)(4) consist of "a referrer of settlement service business (such as a real estate broker or real estate agent) and a recipient of referrals of business (such as a mortgage banker, mortgage broker, title agent or title company)." *Id.* at 29,259. HUD also recognized that these arrangements "may reduce costs to businesses and consumers." Thus:

> Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement service providers. In the long run, any cost savings should be passed on to consumers in most cases. Consumers may benefit

---

[3] Section 2607(c)(5) also provides HUD with the authority to exempt "other payments or * * * transfers" after consultation with various officials. Contrary to the position HUD has taken in this case, HUD has used this authority to propose allowing partial referrals and even the required use of certain settlement service providers. *See, e.g.*, Real Estate Settlement Procedures Act; Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, 67 Fed. Reg. 49,134 (July 29, 2002) (proposing that lenders be permitted to package settlement services).

> additionally from reduced shopping time and related hassles.[4]

In determining whether the entity receiving referrals is "merely a sham arrangement used as a conduit for referral fee payments, [the Policy statement] balances a number of factors in determining whether a violation exists." *Id.* p. 29262. It enumerates ten factors, which "will be considered together." *Id.* No one is "determinative"; rather, HUD will consider all the factors "and will weigh them in light of the specific facts." *Id.* The last of the ten factors is the existence of an exclusive referral agreement. *Id.* Example #4 following the list approves an arrangement involving an exclusive agreement. *Id.* p. 29264: "[U]pon review there appears to be nothing impermissible about these [exclusive] referrals of title business from the title agency to the title insurance company."[5]

Similarly, § 2607(c)(1)(b) of the statute expressly permits the payment of a fee "by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance," and HUD has recognized that title

---

[4] HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements.

[5] *Amici* do not endorse the 1996 Policy Statement, which was promulgated without providing notice and an opportunity for comment, goes beyond the reach of the statute, and was recently held unconstitutionally vague in *Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846 (N.D. Ohio 2010). But the statement does demonstrate that, in HUD's view, exclusive referrals are permissible.

insurance agents may make what are essentially exclusive referrals to title insurance companies so long as the agent performs certain defined "core title services" for the company. *See* Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996).

Respondent herself acknowledged in the court of appeals that exclusive referral agreements are permitted by RESPA.[6] Under these agreements, service provider referrals are not "impartial" and the "healthy competition generated by independent settlement service providers" (H.R. Rep. No. 97-532, *supra*) is reduced – all as expressly permitted by RESPA.

Accordingly, the court of appeals in this case erred in believing that RESPA does not permit exclusive referral agreements (and by implication grants a cause of action for referrals that are not impartial). It is true that RESPA gives an enforceable right to consumers to receive referral services "untainted" or "[un]sullied by kickbacks," *Carter,* 553 F.3d at 989, but only kickbacks that unnecessarily increase the costs of the settlement services.

That conclusion finds even more support in RESPA's limitation of its private civil remedy to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). In many real estate transactions the seller or the lender

---

[6] Reply Brief of Appellant-Petitioner, filed Apr. 20, 2009, at 2009 U.S. 9th Cir. Briefs LEXIS 735, at *3 ("title companies may have exclusive relationships with title insurers" under RESPA).

may agree to assume some or all of the closing costs. If, for example, the appraisal in such a case was paid by the seller or lender but was tainted by a kickback, the borrower would have no remedy under § 2607(d)(2), showing that Congress meant to provide a remedy only to someone actually injured by an unnecessarily increased cost.

C. The Court Of Appeals Misconstrued Section 2607(d)(2).

Section 2607(d)(2) provides that "persons who violate the prohibitions or limitations of this section shall be * * * liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." The court of appeals eschewed any analysis of what actually causes a RESPA violation. Instead, focusing only on this damages provision, it concluded that, because it does not mention an "overcharge" but instead refers to "any charge," RESPA creates a cause of action for three times the settlement service fee "[w]henever a violation * * * occurs." Pet. App. 5a. As shown above, however, no private right of action exists unless the cost of the settlement service at issue was unnecessarily increased by the giving of a kickback, fee, or thing of value in exchange for the referral. Congress was concerned about whether a referral "unnecessarily increased the cost of settlement services," not whether it was impartial.

The court of appeals in this case and in *Carter* thought that the 1983 amendment to § 2607(d)(2) demonstrated Congress' intent to create a RESPA

cause of action for non-financial harm. *See* Pet. App. 5a-6a; *Carter*, 553 F.3d at 987.[7] Before 1983, § 2607(d)(2) provided that a violator would be liable for "an amount equal to three times the value or amount of the fee or thing of value" whereas after the amendment the violator is liable for "an amount equal to three times the amount of any charge paid for such settlement service." The court below found it significant that Congress had "eliminated the 'thing of value' phrasing in the damages provision, replacing it with 'any charge paid,'" as if to say that Congress must have intended to expand the recovery of damages to cases in which no financial harm could be shown. Pet. App. 6a.

That analysis fails to appreciate that the earlier version of § 2607(d)(2) had two subsections, one establishing damages for a violation of § 2607(a) (kickbacks) and the other for a violation of § 2607(b) (fee splitting). *See* Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974). Section 2607(b) does not mention a "thing of value." Thus, when Congress in 1983 consolidated the two provisions of § 2607(d)(2) into one measure of damages for violations of both subsections (a) and (b), it necessarily removed the phrase "thing of value." Inferring a substantive change to expand the scope of recovery to cases where no financial harm may be shown contravenes

---

[7] The court below and the *Carter* court repeated and perhaps were influenced by the similar error of the District Courts in *Kahrer v. Ameriquest Mtge. Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006), and the other decisions cited in *Carter* at 553 F.3d at 983 n.2.

this Court's caution that "'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912)).

Nothing in RESPA's language or legislative history suggests that Congress intended, in amending the damages provision of § 2607(d)(2), to expand RESPA's reach to provide a cause of action for the denial of an impartial referral. In particular, the 1983 amendment did not change RESPA's precisely stated purpose of protecting consumers from kickbacks that "increase unnecessarily the costs" of settlement services. § 2601(b)(2).[8] Thus, even if Congress intended in the 1983 amendment to expand recoverable damages from three times the amount of the overcharge to three times the amount of the entire service charge, that does not mean that Congress meant also to create a cause of action in cases where no overcharge is alleged or provable.[9]

---

[8] In amending RESPA in 1983, Congress did not intend to "change current law which prohibits the payment of unearned fees, kickbacks, or other things of value in return for referrals of settlement service business." H.R. Rep. No. 98-123 at 76 (1983).

[9] A contrary construction of RESPA could lead to ruinous liability of a settlement service provider who committed a technical violation of the statute, a result that would be inconsistent with other federal consumer laws that even for nontechnical violations impose a cap on exposure. *See* 15 U.S.C. 1640(a) (Truth in Lending Act), 15 U.S.C. 1681n(a) & (b) (Fair Credit Reporting Act), 15 U.S.C. 1692k(a) (Fair Debt Collection Practices Act).

That conclusion is reinforced by a consideration of the Act's enforcement mechanisms as a whole. The primary enforcers of § 2607 are public: the Bureau of Consumer Financial Protection as well as State Attorneys General and State Insurance Commissioners have investigative and enforcement duties conferred by § 2617 (Bureau investigatory powers) and § 2607(d)(4) ("The Bureau, the Secretary [of the Treasury], or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section.").[10] Those public officials are the only ones on whom the statute confers the power to seek injunctive relief, and they have a three-year period in which to sue for a violations, as compared to the one year granted a private plaintiff.[11] These provisions reinforce the conclusion that the Act does not give a bounty to private plaintiffs for seeking to preserve fair competition in cases where the conduct complained of inflicts no discernable harm.

In sum, the court below misconstrued § 2607(d)(2) and misunderstood RESPA. If Congress had meant

---

[10] *See* § 1098(7)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. 124 Stat. at 2104.

[11] *See Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 359 5th Cir. 2003 ("Section 2614 actually contains three separate statutes of limitations. The Secretary of Housing and Urban Development, state attorneys general, and state insurance commissioners may sue within three years of any violation of RESPA. 12 U.S.C. § 2614. Private plaintiffs, too, have a three-year limitations period for suits alleging a violation of § 2605 [dealing with escrow accounts]. *Id.* Only for private plaintiffs suing under §§ 2607 and 2608 did Congress impose a one-year limitations period. *Id.*").

to give consumers the right to "impartial" referrals, it would have banned all exclusive referral agreements. Instead it explicitly permits them. Hence the reasonable conclusion is that Congress meant to create a private cause of action under RESPA only for referrals causing an increase in price to the consumer – an overcharge – because of the accompanying kickback. When an alleged kickback does *not* cause an increase in price – as all agree is the case here – the consumer has no injury and no cause of action under RESPA.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
DAVID L. PERMUT
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

August 29, 2011

AMICUS CURIAE BRIEF

ECORD
ND
RIEFS

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STEVE GOTTHEIM
AMERICAN LAND TITLE ASSOCIATION
1828 L Street, N.W.
Washington, D.C. 20036
(202) 261-2943

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. RESPONDENT DOES NOT ALLEGE A CONCRETE AND PARTICULARIZED INJURY-IN-FACT 7

II. EVEN IF RESPA CONFERS A STATUTORY CAUSE OF ACTION, IT DOES NOT CONFER CONSTITUTIONAL STANDING 12

A. Congress Cannot Eliminate The Constitutional Requirement That Injury-In-Fact Be Concrete And Particularized 13

B. RESPA Does Not Create An Interest In "Conflict-Free Referral Advice" 17

III. PERMITTING SUITS BY PLAINTIFFS WHO HAVE NOT SUFFERED AN INJURY-IN-FACT WOULD BE DEVASTATING TO THE TITLE INSURANCE INDUSTRY 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. *Wright*,
468 U.S. 737 (1984) ..... *passim*

Baker v. *Carr*,
369 U.S. 186 (1962) 4

Cent. Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 27

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1976) 21

Durr v. *Intercounty Title Co. of Illinois*, 826 F. Supp. 259 (N.D. Ill. 1993), *aff'd*, 14 F.3d 1183 (7th Cir. 1994) 30

Federal Election Commission v. *Akins*, 524 U.S. 11 (1998) 15, 16, 17

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 13, 14

Havens Realty Corp. v. *Coleman*, 455 U.S. 363 (1982) 17

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

Massachusetts v. *EPA*, 549 U.S. 497 (2007) 6, 13, 14, 15

Moore v. *Radian Group, Inc.*, 233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, 69 F. App'x 659 (5th Cir. 2003) 29

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 9

TABLE OF AUTHORITIES—continued

Page(s)

Public Citizen v. *United States Department of Justice*, 491 U.S. 440 (1989) 15, 16

Raines v. *Byrd*, 521 U.S. 811 (1997) 6, 11, 12

Schlesinger v. *Reservists Comm. to Stop the War*, 418 U. S. 208 (1974) 4, 8, 10

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 11, 16

Steel Co. v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) 8, 9, 10

Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) 27

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009) ..... *passim*

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 16

United States v. *Richardson*, 418 U.S. 166 (1974) 8

Valley Forge Christian Coll. v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 5, 8, 10, 11

Vermont Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 12

Warth v. *Seldin*, 422 U.S. 490 (1975) 4, 9, 16

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES AND LEGISLATIVE HISTORY

2 U.S.C. § 437(g)(a)(1) 16

12 U.S.C. § 2601(b)(4) 20

12 U.S.C. § 2607 10

12 U.S.C. § 2607(c)(4) 3, 10

12 U.S.C. § 2607(d) 26, 29

12 U.S.C. § 2617 28

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) 29

Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450 (1970) 19

International Recovery and Financial Stability Act, Pub. L. No. 98-181, 97 Stat. 1153 (1983) 23

COLO. REV. STAT. § 12-61-113.2 29

KAN. STAT. ANN. § 40-2404 29

OHIO REV. CODE § 3935.07 29

TEX. INS. CODE § 2551.003 29

H.R. REP. NO. 93-117 (1974) 20

H.R. REP. NO. 97-532 (1982) 23, 25

H.R. REP. NO. 98-123 (1983) 23, 25

S. REP. NO. 93-866 (1974) 19, 20

TABLE OF AUTHORITIES—continued

Page(s)

Hearings on Real Estate Settlement Procedures Act – Controlled Business Before the H. Subcomm. on Housing and Community Development, 97th Cong., 1st Sess. 4 (1981) 20, 21, 22

Mortgage Origination: The Impact of Recent Changes on Homeowners and Business: Hearings Before the H. Subcomm. on Ins., Housing, & Community Opportunity (July 13, 2011) 26

RULES AND REGULATIONS

24 C.F.R. § 3500.14 (2006) 28

37 Fed. Reg. 13185 (July 4, 1972).....19

45 Fed. Reg. 49360-02 (July 24, 1980).....21

47 Fed. Reg. 21304-01 (May 18, 1982).....22, 23

53 Fed. Reg. 17424 (May 16, 1988).....24

57 Fed. Reg. 49600 (Nov. 2, 1992) 23, 24

75 Fed. Reg. 57252 (Sept. 20, 2010) 29

MISCELLANEOUS

Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey* (May 2011).....27

Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* (2010) 26

ROBERT H. BORK, THE ANTITRUST PARADOX (1978) 21

TABLE OF AUTHORITIES—continued

Page(s)

BARLOW BURKE, LAW OF TITLE INSURANCE § 2.01 (3d ed. 2000) 1

Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981) 21

John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993) 8, 18

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

Since 1907, the American Land Title Association ("ALTA") has been the national voice for the abstract and title insurance industry. ALTA's membership consists of more than 3,800 title agents, abstracters, and title insurance companies – businesses that search, review, and insure land titles to protect home buyers, real estate investors, and mortgage lenders who invest in real estate. ALTA also counts as associate members other real estate professionals (like attorneys, developers, builders, lenders, brokers, and surveyors) who work toward similar goals.

Title insurance protects homeowners, investors, and lenders from title defects by indemnifying policyholders "for losses caused by either on-record or off-record defects that are found in the title or interest in an insured property." BARLOW BURKE, LAW OF TITLE INSURANCE § 2.01, at 2-3 (3d ed. 2000). The list of defects indemnified by title insurance is extensive, ranging from undisclosed mortgages and judgments to unpaid street assessments and taxes.

As of 2010, the operating income of the title insurance industry was more than $9.6 billion. The industry has grown in large part because of the con-

---

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

fidence it provides to both homeowners and their lenders. Homebuyers can rest assured that they are indemnified for historical errors in title that they never could have imagined, peace of mind that is particularly important today, when so many purchase previously foreclosed properties. At the same time, lenders can do their job feeling secure about the validity, priority, and enforceability of their liens. That security has fueled investment in mortgages, led to the creation of a secondary mortgage market through which mortgages can be bought and sold, made mortgage loans on all types of real property the Nation's largest single category of institutional investment, and, most importantly, ensured the availability of mortgages to consumers seeking to own homes.

For a residential real estate transaction to close successfully, many moving parts must come together. Once a real estate broker assists a consumer in finding a home, the homebuyer generally requires mortgage financing. After financing is arranged, the buyer then engages a title-insurance professional who reviews public records, corrects any errors in title that are found, and issues insurance policies to protect the interests of the both the homebuyer and the homebuyer's lender. And of course, someone – a title company, escrow company, or lawyer – must close the transaction and help transfer the property. If any one of those providers does not do its job, the transaction will not close.

Although in some instances all of the service providers with whom a homebuyer interacts will be independent businesses, in others those providers may be related. For example, one service provider such as a title insurer may have an ownership interest, whole or partial, in another service provider such

as a closing company or real estate brokerage. Such procompetitive arrangements are known in economics and in antitrust law as "vertical integration" such as when an auto company buys a parts company, when a drug company buys a distributor, or when an oil refiner runs its own service stations. These relationships sometimes constitute "controlled" or "affiliated" business arrangements – a status that conveys safe harbor from certain types of liability – but not every relationship between service providers so qualifies. *See* 12 U.S.C. § 2607(c)(4).

This case threatens the title insurance industry with enormous, unforeseen liability for common and longstanding business arrangements, like shared-ownership entities and exclusive agency agreements. Even though state and federal authorities authorize and regulate these types of procompetitive arrangements, the decision below permits private parties to challenge their legality, even when those parties have suffered no personal harm. A buyer who has suffered no increase in the cost of her title insurance policy and no decrease in the quality of service associated with the policy may, according to the decision below, bring suit – even a massive class action – for the sole purpose of collecting an unwarranted bounty. If permitted to stand, the decision below will pointlessly raise the cost of doing business in the industry, hobbling small businesses and counterproductively raising the price of title insurance services for the everyday consumer the law seeks to protect.

SUMMARY OF ARGUMENT

This Court's cases "have established that the irreducible constitutional minimum of standing contains three elements," the first of which is "an injury in fact – an invasion of a legally protected interest

which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks, citations, and footnote omitted). To be considered concrete and particularized, an injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), and it "must affect the plaintiff in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 560 n.1. These longstanding, so-called "personal stake" requirements, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), are central to ensuring that "'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

Respondent's purported "injuries" are neither concrete nor particularized. Her bare interest in collecting a bounty set by Congress, to remedy an ill she did not suffer, does not warrant the exercise of judicial review. She does not claim that she was overcharged for her title policy. Pet. 6. Nor does she claim that her experience with petitioner First American Title was in any way unsatisfactory. *Ibid.* Nor even does she claim that she was denied information that might have caused her to choose a different insurer. *Ibid.* And yet she brings suit nonetheless.

To vindicate what injury? The answer is not particularly clear. According to respondent, petitioners' partial ownership of the title company that conducted the closing on her home, and that title company's agreement to refer certain customers back to petitioners, amounted to a kickback, in violation of the Real Estate Settlement Procedures Act ("RESPA"). *See* 12 U.S.C. § 2607(a). That violation,

respondent contends, in turn denied her a "statutory right" to "conflict-free referral advice." Br. in Opp. 21. That alleged violation was of no actual consequence to respondent – again, she concedes it had no effect on the price or quality of the title services she purchased – yet in the aggregate, she alleges, such violations have "systemic effects . . . on pricing" that "thwart competition." *Id.* at 22.

These "injuries," if they can be called that, do not pass muster under this Court's precedents. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, the injury-in-fact inquiry is concerned with the *tangible consequences* of another's illegal acts, and here there were none. *See Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) (a putative plaintiff must identify a "personal injury suffered . . . *as a consequence* of the alleged" violation).

Respondent cannot make this problem disappear by asserting that she was denied a non-existent right to conflict-free "advice" that was, in any event, entirely immaterial to her. "Standing . . . is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of *perceptible harm*." *Summers*, 129 S. Ct. at 1152 (emphasis added and internal quotation marks omitted).

Nor is it sufficient that respondent alleges certain "systemic" injuries caused by petitioners' conduct. "[A] plaintiff's complaint must establish [not only] that [s]he has a 'personal stake' in the alleged dispute," but also "that the alleged injury suffered is *particularized as to h[er].*" *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (emphasis added). That is facially not true of respondent's pricing allegations.

That Congress may have chosen to afford respondent a statutory cause of action under RESPA does not change the analysis. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. Although "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)), this Court has repeatedly held that, even in those situations, the putative plaintiff must still allege (and ultimately prove) the deprivation of a concrete and particularized interest that exists independently from the procedural right granted by Congress. *E.g.*, *Summers*, 129 S. Ct. at 1151 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."). Respondent has utterly failed to allege the deprivation of any concrete and particularized interest independent of the procedural right (allegedly) granted by Congress.

Nor did Congress attempt here to define such a stand-alone interest in "conflict-free referral advice," let alone take constitutionally sufficient steps to ensure that private parties who suffered no injury can sue. When Congress seeks to assist a plaintiff in meeting Article III's requirements, it "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). The text of RESPA and its legislative

history make clear that the "injuries" Congress was concerned about are precisely those *not* alleged here: high premiums and low-quality service. To hold respondent to be a member of the category of persons constitutionally entitled to bring suit would therefore turn both congressional intent and this Court's precedents on their heads.

Because of the devastating effect that suits like this one would have on the title insurance industry and consumers alike, this Court should be especially wary of engaging in the kind of ingenious exercise in the conceivable that would be necessary to rule for respondent. The business arrangements that respondent alleges violate RESPA are decades old, widespread, and exceedingly popular. If they are found illegal even where they do not harm consumers at all, let alone in any tangible way, the primary effect will be to raise costs and lower quality industry-wide, counterproductively causing precisely the effects Congress intended to prevent with RESPA.

ARGUMENT

I. RESPONDENT DOES NOT ALLEGE A CONCRETE AND PARTICULARIZED INJURY-IN-FACT

To state a case or controversy under Article III, a plaintiff must first establish standing. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). In *Lujan* v. *Defenders of Wildlife*, this Court explained that constitutional standing incorporates three core elements – (1) injury-in-fact, (2) causation, and (3) redressability – each of which serves a different, critical purpose. 504 U.S. at 560-561.

Injury-in-fact – a plaintiff's ability to identify a "[c]oncrete injury, whether actual or threatened [–] is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger*, 418 U.S. at 220-221. It is the "foremost" element of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472 (1982).

Though injury-in-fact "incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, this Court has gone to great lengths to ensure that the requirement is not rendered "meaningless" or "mere talk." *United States* v. *Richardson*, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring). *See also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993) ("Although it is easier to define injury in some cases than in others, the occasional difficulty of the enterprise is hardly reason to abandon it altogether."). Thus, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). "Although [this Court has] packaged the requirements . . . somewhat

differently in the past 25 years . . . the point has always been the same: whether a plaintiff 'personally would benefit *in a tangible way* from the court's intervention.'" *Steel Co.*, 523 U.S. at 103 n.5 (emphasis added) (quoting *Warth*, 422 U.S. at 508). This "is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of *perceptible harm*." *Summers*, 129 S. Ct. at 1152 (emphasis added and internal quotation marks omitted). "Abstract injury is not enough." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

These general "concepts have gained considerable definition from developing case law." *Allen*, 468 U.S. at 751. The Court has articulated a number of guidelines that, together, leave no doubt that respondent has not alleged the requisite injury-in-fact.

Respondent's primary theory of injury, for example, is that she was denied a statutory right to "conflict free referral advice." Br. in Opp. 21. As we explain below, she would lack standing *even if* such a right actually existed in the statute, but it does not. The right respondent claims is merely a mischaracterization of RESPA's anti-kickback provision, 12 U.S.C. § 2607(a).

Respondent claims that "RESPA gives homebuyer[s] a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement)." Br. in Opp. 21. But it is hard to see whence such a right arises, and respondent has not told us. Section 2607(a) bans service providers from the exchange of "any fee, kickback, or thing of value" in return for a referral. Even if it is fair to recharacterize that prohibition on service providers as granting homebuyers a right to title insurance premiums not inflated by kickbacks, the cited section

makes no mention of homebuyers' right to "advice," let alone "conflict-free" advice. Of course, respondent does not even purport to have purchased "advice" from petitioners; she purchased a title insurance policy that she concedes is perfectly acceptable in both price and quality.

Nor is it clear where in the statute respondent believes homebuyers are given the additional "right" of "timely disclosure" about affiliated business arrangements. No such right exists either. Title 12 U.S.C. § 2607(c)(4) merely creates a safe harbor whereby affiliated businesses that meet certain requirements can insulate themselves from claims under § 2607. One of those requirements is disclosure. *Id.* § 2607(c)(4)(A). But a service provider's decision not to avail itself of the safe harbor – as is the case here – is not *ipso facto* a violation of § 2607.

In any event, even if petitioners violated the law, respondent lacks constitutional standing. As this Court has repeatedly clarified, one party does not suffer an injury-in-fact *merely* because another violates the law (which, in any event, petitioners did not). *See Schlesinger*, 418 U.S. at 223 n.13 (denying standing for a claim of "the abstract injury in nonobservance of the Constitution"); *Allen*, 468 U.S. at 754 (same). A desire to seek "vindication of the rule of law . . . . does not suffice" to establish standing. *Steel Co.*, 523 U.S. at 106.

As this Court explained in *Valley Forge*, a putative plaintiff must identify a "personal injury suffered . . . *as a consequence* of the alleged" violation. 454 U.S. at 485-486. Bald assertions that petitioners' conduct "tainted" her title policy (Br. in Opp. 20) are not enough. *See Valley Forge*, 454 U.S. at 485 ("the psychological consequence presumably pro-

duced by observation of conduct with which one disagrees" is insufficient to confer standing). Respondent needs to point to some personal, "perceptible harm" that arose as a consequence of petitioners' alleged violation. *Summers*, 129 S. Ct. at 1152 (internal quotation marks omitted). She has not done so.

Nor can respondent establish standing through her theory that, in the aggregate, the kind of arrangement entered into by petitioners has "systemic effects . . . on pricing" that "thwart competition." Br. in Opp. 22. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be *himself* among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (emphasis added) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)). The fact that respondent participated in the larger business of the industry – or that her policy was purchased "incident to" an allegedly prohibited arrangement, 12 U.S.C. § 2607(a) – is not enough because the "key" point is "that a plaintiff's complaint must establish [not only] that [s]he has a 'personal stake' in the alleged dispute," but also "that the alleged injury suffered is *particularized as to h[er].*" *Raines* v. *Byrd*, 521 U.S. at 819 (emphasis added). Whatever ill effect petitioners' business arrangements supposedly (and contrary to economic theory, *see infra* pp. 20-21 & n.6) may have on pricing or service on a "systemic" level, respondent has not alleged that they affected *her*.

Finally, the fact that respondent will benefit if her suit is successful does not suffice to create the type of interest whose deprivation constitutes injury-in-fact: An interest "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont*

Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

Even liberally construed, none of respondent's allegations amounts to anything that resembles the type of injury-in-fact previously recognized by this Court. If RESPA prohibits certain aspects of petitioners' business arrangement, then the responsibility for "[v]indicating the public interest . . . is the function of Congress and the Chief Executive." *Defenders of Wildlife*, 504 U.S. at 576 (emphasis deleted). It is not – under the Constitution, it *cannot* be – the responsibility of individual plaintiffs who lack their own concrete and particularized injury.

II. EVEN IF RESPA CONFERS A STATUTORY CAUSE OF ACTION, IT DOES NOT CONFER CONSTITUTIONAL STANDING

The lower court held that, "[b]ecause RESPA gives Plaintiff a statutory cause of action, . . . Plaintiff has standing to pursue her claims against Defendants." Pet. App. 7a. *See also* Br. in Opp. 18 n.10 (asserting that "injury in fact is established here by the invasion of an individual statutory right."). We assume for the sake of argument that RESPA does give respondent a statutory cause of action.[2] The existence of a statutory cause of action, however, does not suffice to answer the independent question whether a particular plaintiff bringing suit under RESPA has standing to do so under the Constitution. *See Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing re-

---

[2] Although it is *amicus's* position that the lower court's holding on this question was incorrect, *amicus* assumes the correctness of that holding here because this Court granted certiorari only on the question of constitutional standing.

quirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). Congress has the power to relax *some* of the constitutional requirements of Article III standing, but that power *does not* extend to the requirement that a plaintiff's injuries be concrete and particularized. Furthermore, because Congress did not seek to articulate a free-standing, abstract interest in so-called "conflict-free referral advice," respondent's claim would fail *even if* Congress could do away with the requirement of a concrete and particularized injury.

A. Congress Cannot Eliminate The Constitutional Requirement That Injury-In-Fact Be Concrete And Particularized

This Court has held that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts* v. *EPA*, 549 U.S. at 516 (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). That holding is grounded in a recognition that, by statute, Congress not only can dispense with prudential limitations on standing,[3] but also can relax certain aspects of the three core constitutional elements of standing, as well. For example, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal

---

[3] *See Gladstone*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules.") (internal quotation marks omitted).

standards for redressability and immediacy.'" *Massachusetts*, 549 U.S. at 517-518 (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7). Central to this case, however, the requirement that injury-in-fact be concrete and particularized is *not* one such element that can be relaxed or eliminated by Congress. As this Court observed in both *Defenders of Wildlife* and *Massachusetts* v. *EPA*, Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." *Ibid.* (emphasis added).

"[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers*, 129 S. Ct. at 1151 "Congress .... can loosen the strictures of the redressability prong of our standing inquiry.... Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Ibid.*; *see also Gladstone*, 441 U.S. at 100 ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must *always* have suffered a distinct and palpable injury to himself.") (emphasis added) (internal quotation marks omitted).

In *Massachusetts* v. *EPA*, for example, the Court did not base standing on the mere fact that Congress had conferred a cause of action on Massachusetts or had defined the effects of global warming to be an injury. Rather, it recognized standing based on the potential *factual* injury that global warming could cause flooding of Massachusetts land. 549 U.S. at 522. Even as the Court arguably relaxed requirements that the alleged injury-in-fact be imminent and not conjectural, *see id.* at 541-542 (Roberts, C.J., dissenting), it continued to emphasize the need for the plaintiff State to "allege[] a particularized injury

in its capacity as a landowner," 549 U.S. at 522 (majority opinion).

Indeed, far from permitting suit simply because Congress had conferred on plaintiffs a procedural right to bring suit, "[t]he procedural injury must impair a *separate concrete* interest." *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (internal quotation marks omitted and emphasis added). This Court has taken care to identify those concrete and particularized interests to drive home the point.

Public Citizen v. *United States Department of Justice*, 491 U.S. 440 (1989), is illustrative. There, the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the statute created a private right of action, but because of the "distinct injury" resulting from the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

So too in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998), the Court recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act . . . has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437(g)(a)(1)). As in *Public Citizen*, the Court did not find standing simply because a statutory right had been violated. Rather, the Court looked for and found the requisite concrete and particularized injury in the *conse-*

quences of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, *see Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, *see id.* at 24-25 ("the informational injury at issue here . . . is sufficiently concrete and specific"). The Court was *not*, as respondent seems to believe, creating a new type of injury out of thin air. Unlike the plaintiffs in *Akins*, respondent here has not articulated a concrete and particularized injury that exists separately from (or even is the consequence of) the statutory violation. And the mere alleged violation itself is not enough.

The Court has for decades emphasized the difference between the violation of a statutory right (which does not *ipso facto* confer Article III standing) and the violation of a statutory right that results in a concrete and particularized injury-in-fact (which *can* result in standing). *Compare Sierra Club* v. *Morton*, 405 U.S. 727 (1972), *with Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* . . . is alleged here"). Thus, when the Court in *Warth* observed that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," 422 U.S. at 500 (internal quotation marks omitted), it was merely observing that a statutory violation can precipitate a concrete and particularized injury-in-fact. The Court was not suggesting, as the Ninth Circuit concluded (Pet. App. 7a), that a statutory violation *substitutes* for such an injury.

Respondent (Br. in Opp. 21) cites *Akins* – as well as *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 374 (1982) – for the proposition that the invasion of a

"statutorily created right to truthful . . . information" suffices to establish "injury in fact." But they stand for no such principle. As the Court explained in *Defenders of Wildlife*, 504 U.S. at 578, the concrete and particularized injury in cases like *Havens* and *Akins* does not exist by virtue of statute but rather by virtue of the underlying "*de facto*" injuries that arise as a *consequence* of the violation of the rights created by Congress. In *Akins*, the *de facto* injury identified by the Court was the inability to make informed voting decisions caused by the denial of access to certain information guaranteed by statute. *See* 524 U.S. at 21. In *Havens*, the Court explained that petitioner's race-based "misinformation . . . concerning the availability of apartments . . . *caused* [respondent's] 'specific injury,'" which was a resulting stigmatization. 455 U.S. at 369 (emphasis added). *See also Allen*, 468 U.S. at 755 (racial discrimination is a "stigmatizing injury" of "serious consequence[]"). Here, even if RESPA creates some right to information about conflicted referrals – which, as explained above, it does not – respondent does not allege that the denial was of any consequence. "Statutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Defenders of Wildlife*, 504 U.S. at 578 (internal punctuation and quotations marks omitted).

B. RESPA Does Not Create An Interest In "Conflict-Free Referral Advice"

Even if Congress *could* define a sufficiently concrete and particularized injury where (as here) there exists no underlying *de facto* injury, respondent would lack standing. Congress "must at the very least identify the injury it seeks to vindicate and re-

late the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).[4]

Congress did not do so here. Indeed, the statutory text of RESPA and its legislative history contain no evidence that Congress intended to create a standalone right to "conflict-free referral advice," Br. in Opp. 21, let alone that it intended private parties who suffered no injury to the cost or quality of their title insurance to be able to bring suit against allegedly impermissible business arrangements. Rather, for nearly forty years, Congress has been exceedingly clear in text (and committees and Members have been exceedingly clear in legislative history) that Congress's and its Members' concerns were precisely and exclusively those injuries that respondent concedes she has *not* suffered: high costs and low quality. It would therefore turn Congress's intent on its head to construe RESPA as somehow conferring constitutional standing on a plaintiff who has not suffered those injuries.

RESPA, codified in full at 12 U.S.C.§§ 2601-2617, was enacted in 1974 with the explicit objective of reducing the excessive cost of real estate settlements.

---

[4] *See also Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (respondents had no standing because "[n]othing in the statute at issue here . . . indicates Congress intended to identify or confer some interest separate and apart from a procedural right"); Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. at 1227 ("[H]olding that Congress may override the injury limitation of Article III would have been both remarkable and particularly unfortunate in *Defenders*, because there is no indication that Congress embarked on such an ambitious undertaking when it enacted the Endangered Species Act.").

See 12 U.S.C. § 2601 ("Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers . . . are protected from unnecessarily high settlement charges."). The purpose of RESPA is to "ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated." S. REP. NO. 93-866, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548.

Before RESPA's enactment, Congress briefly considered direct price regulation. The Emergency Home Finance Act of 1970 empowered the Department of Housing and Urban Development ("HUD") to prescribe standards concerning the amount of settlement costs allowable in connection with federally insured housing transactions and report to Congress concerning legislative and administrative measures that should be taken to standardize and reduce mortgage settlement costs. Pub. L. No. 91-351, 84 Stat. 450, 464 (1970). In 1972, HUD proposed maximum allowable charges for six settlement items in six metropolitan areas, with an intention of later rolling out equivalent rates nationally. *See Mutual Mortgage Insurance and Insured Home Improvement Loans*, 37 Fed. Reg. 13185 (July 4, 1972). But Congress ultimately did not directly regulate the cost of settlement services. Congress instead chose to address the problem indirectly, by "regulat[ing] the underlying business relationships and procedures of which the costs are a function." H.R. REP. NO. 93-1117 ["1974 House Report"], at 4 (1974).[5]

It did so in three ways. The first and "most important feature of the legislation from the standpoint

---

[5] In all pertinent respects, the Senate reached similar conclusions for similar reasons. *See* S. REP. NO. 93-866, at 3-6.

of making significant reductions in . . . settlement charges" was its provisions mandating a "simplification of the land recordation process." 1974 House Report at 4; *see also* 12 U.S.C. § 2601(b)(4). Second, Congress required "that home buyers be [presented] with greater information on the nature of the settlement process," with a hope that "many unnecessary or unreasonably high settlement charges will be reduced or eliminated" as a result of those disclosures. 1974 House Report at 4. Third and finally, Congress prohibited "kickbacks, unearned fees, and unreasonable escrow account requirements" to ensure that costs were not "unreasonably or unnecessarily inflated." *Ibid.* Importantly, Congress did not express an interest in any of these issues in the abstract; they mattered only to the extent that they "tend[ed] to increase the cost of settlement services without providing any benefits to the home buyer." *Id.* at 7.

When RESPA was enacted, affiliated or "[c]ontrolled business arrangements" – which can include the shared-ownership and exclusive-agency agreements at issue here – "were not anticipated, and thus, were not mentioned." *Hearings on Real Estate Settlement Procedures Act – Controlled Business Before the H. Subcomm. on Housing and Community Development*, 97th Cong., 1st Sess., at 4 (1981) [hereinafter "House CBA Hearings"] (statement of Dr. E.S. Savas, Ass't Sec. Pol'y Dev. & Res., U.S. Dept. Housing & Urban Dev.). Thus, as such arrangements became more prevalent in the late 1970s, it was simply not clear – even to HUD, the agency tasked with enforcing the Act – whether, or in what circumstances, they were prohibited.[6] Rather than

[6] During the same period, partly as a result of this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36

rush to judgment, in July 1980 HUD issued an interpretive rule stating that "controlled business relationships *may* be a violation" of RESPA's anti-kickback provisions, 45 Fed. Reg. 49360-02 (July 24, 1980), but left the issue open pending a study of whether or when the arrangements undermined RESPA's core purpose of bringing down settlement prices.[7]

The results of the HUD study were presented to Congress in September 1981. Far from finding that controlled-business arrangements were a type of abusive practice that tended to raise prices for consumers, HUD found "that a controlled business arrangement may be the cheapest and most efficient provider of [title services]." House CBA Hearings at 4. Indeed, "referral to a controlled business saves the consumer time and money in searching [and] .... may lower the total package price to the consumer." *Ibid.*

HUD's conclusion that controlled business arrangements did not necessarily raise costs, and may often lower them, was shared by the other federal

---

[Footnote continued from previous page]

(1977), antitrust scholars and courts were rethinking their traditional hostility to vertical relationships and arrangements. *See, e.g.*, Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); ROBERT H. BORK, THE ANTITRUST PARADOX 225-245 (1978).

[7] Notably, HUD was not even concerned with the particular arrangement at issue here, an insurance underwriter with an interest in its agent. HUD's focus was arrangements across *different* types of services, "typically a real estate broker, mortgage lender, attorney, etc. [who] has an ownership interest in a settlement service." 45 Fed. Reg. 49360-02.

agencies that appeared before Congress in 1981. The General Counsel of the Federal Home Loan Bank, for example, "found no support in the legislative history" of RESPA to indicate that controlled-business arrangements fell with the Act's anti-kickback provisions and argued that prohibiting those arrangements actually "conflict[ed] with RESPA's purpose of protecting consumers from unnecessarily high settlement charges," because of the positive effect they often have on prices. House CBA Hearings at 47 (statement of Thomas P. Vartanian); *see also id.* at 48 ("Prohibiting controlled business will not by itself assure fair prices nor high quality in title work, or other settlement services."). Analysts from the Federal Trade Commission expressed similar views. *See id.* at 64 (statement of Thomas H. Stanton and John P. Brown) ("[C]ompetition from controlled businesses is likely to decrease settlement costs, and therefore should be encouraged.").

In 1982, HUD withdrew its earlier interpretive ruling (the one that had said controlled-business relationships "may" violate RESPA). 47 Fed. Reg. 21304-01 (May 18, 1982). In doing so, HUD noted – in a comment that belies respondent's claims that RESPA reflects a concern for "conflict-free" advice or with the relationship between title-service providers – that its previous ruling had incorrectly been "perceived as indicating[] that the *mere* fact of a controlled business relationship between two firms, and the referral of settlement services business by one to the other, constituted a [RESPA] violation." *Ibid.* (emphasis added). That perception was wrong, as Congress's concern was with prices and it "did not consciously address the desirability of controlled business relationships in settlement services industries when enacting [RESPA] or subsequently." *Ibid.*

It was against this backdrop that Congress, in 1983, amended RESPA to *legalize* controlled-business arrangements explicitly. Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181 § 461(b), 97 Stat. 1153 (1983). While clarifying that "controlled business arrangements . . . are a permissible method of doing business," H.R. REP. NO. 98-123, at 75 (1983) ["1983 House Report"], however, Congress nevertheless acknowledged that such arrangements could, *in some instances*, still result in the type of injuries RESPA was always meant to prevent. Specifically, Congress expressed a concern that consumers might "pay unreasonably high premiums" – a concern that had long been the focus of RESPA – or might receive "poor service" or "faulty title examinations," as well. H.R. REP. NO. 97-532, at 51 (1982) ["1982 House Report"].

To balance its decision to legalize controlled-business arrangements with its ongoing interest in the price and quality of title services, Congress decided to leave the anti-kickback provisions in place, but to create a safe harbor for controlled-business arrangements that meet certain basic requirements, of which one is disclosure.[8] The safe harbor is entirely

---

[8] *See* 12 U.S.C. § 2607(c)(4). In November 1992, HUD issued its first regulation implementing these requirements. *See Regulation X*, 57 Fed. Reg. 49600 (Nov. 2, 1992), *codified at* 24 C.F.R. § 3500.15. That rule provided that a controlled-business arrangement was not a violation of RESPA and allowed referrals of business to an affiliated settlement service provider so long as: (1) The consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the ar-

optional, however; contrary to respondent's claims, the plain text of the statute demonstrates that Congress did *not* make the disclosure of a controlled-business arrangement a freestanding, statutory right.[9]

Nor did Congress or any component of Congress suggest that the safe-harbor requirements reflect some stand-alone concern about the advice given to consumers. The requirements were simply considered an additional method to "protect consumers from [certain] abuses" – specifically, unreasonably high premiums, poor service, and faulty title examinations – "that can arise from such referrals." 1982 House Report at 52. Indeed, precisely those referral mechanisms that respondent seems to allege are inherently "conflicted" – exclusive agency agreements, for example – are explicitly *permitted* under the 1983

[Footnote continued from previous page]

rangement, other than payments for services rendered, is a return on ownership interest.

[9] HUD has made this point explicitly: "[I]t is HUD's view that there is little legal or factual justification for viewing a controlled business arrangement which fails to meet all elements of the new exemption as a *per se* [§ 2607] violation (*i.e.*, legal only if the elements of the new exemption are satisfied). . . . *If Congress wanted this result it could easily have modified Section [2607(a)] or otherwise stated directly that some or all controlled business arrangements were always illegal without regard to Section [2607(a)]. The RESPA amendments passed in 1983 do not compel this reading.*" 53 Fed. Reg. 17424, 17425 (May 16, 1988) (emphasis added). HUD later abandoned even the proposed presumption of a RESPA violation. *See* 57 Fed. Reg. at 49601 (rather than declare that the mere existence of a controlled business arrangement raises a presumption of a § 2607(a) violation, HUD's final rule stated simply that such arrangement do not violate § 2607(a) if the exemption is met).

amendments so long as (like any other agreement) they don't unnecessarily raise settlement prices. *See id.* at 54-55.

An early draft of the 1983 amendments would have imposed a percentage limitation on the amount of controlled business that could be transacted by a controlled title company, out of concern that preferred or exclusive referrals "will enable these companies to be insulated to a great degree from having to compete on the merits of their prices and services." 1982 House Report at 55. Although Congress ultimately found such a restriction unnecessary, 1983 House Report at 78, it is nevertheless additional evidence that Congress was concerned with price and quality, and not with such arrangements in the abstract.

III. PERMITTING SUITS BY PLAINTIFFS WHO HAVE NOT SUFFERED AN INJURY-IN-FACT WOULD BE DEVASTATING TO THE TITLE INSURANCE INDUSTRY

The principle advanced by respondent – that there is no constitutional barrier to an uninjured plaintiff availing herself of a statutory remedy – threatens common business arrangements in the title industry that have been accepted for decades.

In 2010, for example, nearly a quarter of all title premiums – totaling nearly $2.3 billion – were written through affiliated entities. *See* Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* at 7 (2010). Indeed, the nation's 500 largest residential real estate brokerage firms conducted 358,172 title closings through companies that were affiliated with each other in ways much like petitioners here. *See Mortgage Origination: The Impact of Recent Changes*

on Homeowners and Business: Hearings Before the H. Subcomm. on Ins., Housing & Community Opportunity, at 2 (July 13, 2011) (statement of Tim Wilson, Long and Foster Co.) [hereinafter *Mortgage Origination Hearings*].[10] If respondent prevails, every one of these closings could become the basis for a lawsuit, potential damages in which would be three times the total cost of the services provided, plus attorneys' fees. 12 U.S.C. § 2607(d)(2).

The liability does not end there. Most real-estate businesses with shared ownership involve not only title companies and their agents, but mortgage lenders, realtors, builders and attorneys, as well. *See Mortgage Origination Hearings* at 2 (affiliated entities closed 150,962 mortgage loans in 2010). Under respondent's theory, *each* step in the mortgage process that involves a new affiliated entity – each "settlement service involved in the violation" under 12 U.S.C. § 2607(d)(2) – is a separate basis for liability. Each of those affiliated entities would be liable for three times what they charged, plus attorneys' fees. The total potential liability would be widespread and staggering.

"This uncertainty and excessive litigation can have ripple effects." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). The most obvious is that the increased litigation risk incurred by affiliated entities will raise the cost of business in the industry, resulting in higher premiums for every homebuyer that needs ti-

---

[10] In this case, respondent complains of a title insurance company owning part of the title agency that issued her policies, as well as the applicable agency agreement between them. In the title insurance industry, this type of insurer-owned agent is exceedingly common.

tle services (which is to say, nearly every homebuyer). Prices will rise not because service providers have necessarily violated any law, but because the "extensive discovery and the potential for uncertainty and disruption in . . . lawsuit[s like this one could] allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Indeed, the primary effect of permitting the type of no-harm lawsuit at issue here will be to raise title insurance premiums – *precisely* the outcome RESPA tries to work against. Respondent's position would also deny consumers the choice of working with integrated-service providers, counterproductively working against RESPA's goal of promoting high-quality title service, as well.

Not only does respondent's position threaten existing business arrangements with enormous liability, but it also has a profound effect on small businesses that may wish to enter into such arrangements in the future. Nearly a third of title-service providers have only one or two employees, and nearly sixty percent have five or fewer. *See* Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey*, at 9 (May 2011). A majority have gross annual revenues of less than $500,000. *See id.* at 7. Because these companies typically operate with small cash reserves, they are particularly vulnerable to changing market conditions. When they need access to additional funding, a common source is other title-service providers, particularly when – as is the case today – commercial banks are hesitant to extend credit. Thus, to raise the money necessary to pay employees in bad times or expand operations in good ones, a small title agent or closing company might invite a title insurer to take a position in the busi-

ness in exchange for the necessary infusion of cash. If permitted, no-harm lawsuits will deter such collaborative arrangements and, in the process, severely limit small title-service providers' access to capital.

The effects of that limitation will be disproportionately felt by the many small title-service providers that are family-owned and operated. When the inevitable life-cycle event – a death or divorce, for example – strikes these businesses, the remaining family members often find themselves forced to liquidate a portion of their company. If larger-service providers, the most likely buyers of these partial interests, are foreclosed from doing so, it is necessarily the case that the value of these small businesses will be diminished.

None of this is necessary to ensure that RESPA is properly enforced or that consumers are adequately protected from the "systemic" issues about which respondent complains. Br. in Opp. 22. To the contrary, the title insurance industry is already highly regulated by federal and state authorities. RESPA, for example, expressly authorizes HUD to make rules that implement the statute, *see* 12 U.S.C. § 2617, a power the agency has frequently exercised, *see, e.g.*, 24 C.F.R. § 3500.14 (2006) (HUD regulation governing kickbacks and unearned fees).[11] HUD also has the discretion to bring actions to enjoin violations, *see* 12 U.S.C. § 2607(d), which some courts

---

[11] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061-1062, 124 Stat. 1376, 2039-40 (2010), responsibility for implementing and enforcing RESPA moved from HUD to the newly formed Consumer Financial Protection Bureau on July 21, 2011. *See also* 75 Fed. Reg. 57252 (Sept. 20, 2010) (designating transfer date).

have held it can do "even if such [violations] cause no actual injury to consumers." *Moore* v. *Radian Group, Inc.*, 233 F. Supp. 2d 819, 824 (E.D. Tex. 2002), *aff'd*, 69 F. App'x 659 (5th Cir. 2003).

In addition, virtually every State regulates title insurance, as well. Some do it through supervisory agencies with broad administrative powers, including the power to set the rates that title insurance companies can charge. *See, e.g.*, TEX. INS. CODE § 2551.003. Others require that title insurance companies submit rates for official approval. In this case, for example, petitioners charged respondent the rate mandated by an approved schedule of rates in Ohio. *See* OHIO REV. CODE § 3935.07. Many States also have laws directed specifically at the type of business arrangements respondent challenges here. *See, e.g.*, COLO. REV. STAT. § 12-61-113.2; KAN. STAT. ANN. § 40-2404. Moreover, state attorneys general have the power to enforce all of their own laws, and the authority to bring actions to enforce both RESPA and HUD's regulations as well. 12 US.C. § 2607(d).

This is not an area of law lacking either in regulation or in parties able to prosecute actions for the public good. This is not one of those actions, however. To the contrary, permitting the type of no-harm lawsuit brought here will open the floodgates for a few enterprising plaintiffs and their attorneys to arrogate for themselves a bounty whose cost will be entirely externalized on the public at large. *See Durr* v. *Intercounty Title Co. of Illinois*, 826 F. Supp. 259, 264 (N.D. Ill. 1993) (observing that there is "no *public* benefit in converting RESPA into some type of Attorneys' Relief Act where the public weal is really not being served at all – or if it is, is being served minimally at best"), *aff'd*, 14 F.3d 1183 (7th Cir.

1994). That is neither what Congress intended nor what the Constitution permits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

STEVE GOTTHEIM
AMERICAN LAND TITLE ASSOCIATION
1828 L Street, N.W.
Washington, D.C. 20036
(202) 261-2943

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

August 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DONALD M. FALK
Counsel of Record
Mayer Brown LLP
Two Palo Alto Square,
Suite 300
Palo Alto, CA 94306
(650) 331-2000
dfalk@mayerbrown.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTION PRESENTED

Whether a person who in the course of buying goods or services has been subjected to a violation of a legal duty, but has sustained no tangible, emotional, or economic harm as a result, has standing to sue under Article III, § 2.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 8

I. Persons Who Are Unaffected By A Violation Of Legal Duty Lack Standing To Sue. 8

II. Permitting Standing To Rest On A Harmless Breach of Legal Duty Would Have Severe, Deleterious Consequences In Class Action Litigation. 12

A. Affirmance Would Entrench And Propagate The Novel Device of the No-Injury Class Action By Excusing Common Proof—Or Any Proof—Of A Concrete, Particularized Injury-In-Fact And Its Causation. 12

B. Affirmance Would Make Causation And Injury Irrelevant To Standing Or Class Certification Whenever A Court Or Legislature Desired That Result. 20

C. Diluting the Injury-In-Fact Requirement Would Exacerbate The Problem Of Annihilating Damages For Harmless Violations of Law. 25

D. Affirmance Would Increase The Risk Of Judicial Intrusion Upon NHTSA's Prerogative To Determine Which Safety Risks Warrant Recalls Of Vehicles That Have Not Manifested Dangerous Defects. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. *Wright*, 468 U.S. 737 (1984) 10, 15

American Suzuki Motor Corp. v. *Superior Court*, 37 Cal.App.4th 1291 (1995) 27

Anthony v. *General Motors Corp.*, 33 Cal.App.3d 699 (1973) 28

Arizona Christian School Tuition Organization v. *Winn*, 131 S. Ct. 1436 (2011) 8, 9. 10, 23

AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 25

Avritt v. *Reliastar Life Ins. Co.*, 615 F.3d 1023 (8th Cir. 2010) 14, 19

Bateman v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) 26

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 25

Briehl v. *General Motors Corp.*, 172 F.3d 623 (8th Cir. 1999) 17

Bussian v. *DaimlerChrysler Corp.*, 411 F.Supp.2d 614 (M.D.N.C. 2006) 27

Chamberlan v. *Ford Motor Co.*, 314 F.Supp.2d 953 (N.D. Cal. 2004) 28

Chamberlan v. *Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) 19

Chavez v. *Blue Sky Natural Beverage Co.*, 268 F.R.D. 365 (N.D. Cal. 2010) 14

TABLE OF AUTHORITIES—continued

Page(s)

Cole v. *Gen. Motors Corp.*,
484 F.3d 717 (5th Cir. 2007) 18

Daffin v. *Ford Motor Co.*,
458 F.3d 549 (6th Cir. 2006) 19

Daimler-Chrysler Corp. v. *Cuno*,
547 U.S. 332 (2006) 8, 11, 21

DaimlerChrylser Corp. v. Inman,
252 S.W.3d 299 (Tex. 2008) 18

Denney v. *Deutsche Bank AG*,
443 F.3d 253 (2d Cir. 2006) 16

Dura Pharmaceuticals, Inc. v. *Broudo*,
544 U.S. 336 (2005) 24

Elk Grove Unified School Dist. v. *Newdow*,
542 U.S. 1 (2004) 8

FEC v. *Akins*, 524 U.S. 11 (1998) 10

General Telephone Co. v. *Falcon*,
457 U.S. 147 (1984) 21

Gladstone, Realtors v. *Village of Bellwood*,
441 U.S. 91 (1979) 9, 10

In re Bridgestone/Firestone Inc. Tires Products Liability Litigation, 153 F.Supp.2d 935
(S.D. Ind. 2001) 27

In re Bridgestone/Firestone Tires Products Liability Litigation,
288 F.3d 1012 (7th Cir. 2002) 17

TABLE OF AUTHORITIES—continued

Page(s)

Kent v. *DaimlerChrysler Corp.*,
200 F.Supp.2d 1208 (N.D. Cal. 2002)..... 28

Kohen v. *Pac. Inv. Mgmt. Co.*,
571 F.3d 672 (7th Cir. 2009)..... 16, 25

Lee v. *American National Ins. Co.*,
260 F.3d 997 (9th Cir. 2001)..... 21

Lilly v. *Ford Motor Co.*, 2002 WL 84603
(N.D. Ill. 2002) 27

Lujan v. *Defenders of Wildlife*,
504 U.S. 555 (1992)..... 8, 9

Mazza v. *American Honda Motor Co.*,
254 F.R.D. 610 (C.D. Cal. 2008), revised,
2009 WL 6025547 (C.D. Cal. Jan. 8, 2009),
appeal pending, No. 09–55376
(Ninth Cir. argued June 9, 2010) 14

Murray v. *GMAC Mortgage Corp.*,
434 F.3d 948 (7th Cir. 2006)..... 26

Namovicz v. *Cooper Tire & Rubber Co.*,
225 F.Supp.2d 582 (D. Md. 2001)..... 27

Nike Inc. v. *Kasky*, 539 U.S. 654 (2003) 21

O'Neil v. *Simplicity, Inc.*,
574 F.3d 501 (8th Cir. 2009)..... 16

Oshana v. *Coca-Cola Co.*,
472 F.3d 506 (7th Cir. 2006)..... 16

Raines v. *Byrd*, 521 U.S. 811 (1997) 9

TABLE OF AUTHORITIES—continued

Page(s)

Rivera v. *Wyeth-Ayerst Labs.*,
283 F.3d 315 (5th Cir. 2002) 16

Shady Grove Orthopedic Assocs., P.A. v.
Allstate Ins. Co., 130 S. Ct. 1431 (2010) 25

Stearns v. *Ticketmaster Corp.*,
__ F.3d __, 2011 WL 3659354
(9th Cir. Aug. 22, 2010) 22–25

Summers v. *Earth Island Institute*,
129 S. Ct. 1142 (2009) 9, 11

Tobacco II Cases, 46 Cal. 4th 296
(2009) 21–23

Toyota Motor Corp. Unintended Acceleration
Litigation, 754 F.Supp.2d 1145,
(C.D. Cal. 2010) 28

Toyota Motor Corp. Unintended Acceleration
Litigation, __ F. Supp. 2d __,
2011 WL 1840555 (C.D. Cal. May 13, 2011) ... 13

Vuyanich v. *Republic National Bank*,
82 F.R.D. 420 (N.D. Tex. 1979) 21

Vuyanich v. *Republic National Bank*,
723 F.2d 1195 (5th Cir. 1984) 22

Wal-Mart Stores, Inc. v. *Dukes*,
131 S. Ct. 2541 (2011) .....*passim*

Walsh v. *Ford Motor Co.*,
807 F.2d 1000 (D.C. Cir. 1986) 18

Warth v. *Seldin*, 422 U.S. 490 (1975) 11

TABLE OF AUTHORITIES—continued

Page(s)

Wolin v. *Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010) 18–19

Yokoyama v. *Midland National Life Ins. Co.*, 594 F.3d 1087 (9th Cir. 2010) 14

CONSTITUTION, STATUTES, RULES AND REGULATIONS

U.S. Const., Art. III ..... *passim*

Fair and Accurate Credit Transactions Act, Pub. L. No. 108–159 (2003), codified in 15 U.S.C. § 1681 *et seq.* 26

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* 26

Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.* 27

Rules Enabling Act, 28 U.S.C. § 2072(b) 24

Cal. Bus. & Prof. Code § 17200 *et seq.* 21

Cal. Bus. & Prof. Code § 17500 *et seq.* 21

Fed. R. Civ. P. 23 ..... 24, 26

Fed. R. Civ. P. 23(a)(2) 3

Fed. R. Civ. P. 23(b)(3) 3

Sup. Ct. R. 37.6 1

MISCELLANEOUS

Stephen Breyer, Breaking the Vicious Circle (1993) 28

TABLE OF AUTHORITIES—continued

Page(s)

The Federalist No. 78 (Alexander Hamilton) (George W. Carey & James McClellan, eds. 2001)..... 11

BRIEF OF THE ASSOCIATION OF GLOBAL AUTOMAKERS, INC. AND THE ALLIANCE OF AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Together the *amici curiae* represent the manufacturer or distributor of almost every automobile sold in the United States.[1]

The Association of Global Automakers, formerly known as the Association of International Automobile Manufacturers, is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 15 international motor vehicle manufacturers including: American Honda Motor Co., Inc.; American Suzuki Motor Corp.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, LLC; Kia Motors America, Inc.; Mahindra & Mahindra Ltd.; Maserati North America, Inc.; McLaren Automotive, Ltd.; Mitsubishi Motors North America; Nissan North America; Peugeot Motors of America; Subaru of America, Inc.; and Toyota Motor North America, Inc. Global Automakers' mission is to foster an open and competitive automotive marketplace in the United States that works to improve vehicle safety, encourage technological innovation, and promote responsible environ-

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters evidencing blanket consent to the filing of *amicus* briefs have been filed with the Clerk.

mental practices. Its members account for about 40 percent of the motor vehicles built and sold in America today.

The Alliance of Automobile Manufacturers, Inc. is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The members of the Alliance are BMW of North America, LLC; Chrysler Group LLC; Ford Motor Company; General Motors Corporation; Jaguar Land Rover; Mazda North American Operations; Mercedes-Benz USA; Mitsubishi Motor Sales of America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc; Volkswagen of America, Inc.; and Volvo Cars North America, LLC.

The *amici* and their members have a strong interest in the proper delineation of the standing requirements that derive from the Cases or Controversies Clause of Article III. Under the Ninth Circuit's holding in the decision below, standing is whatever Congress (or a State legislature) says it is: whenever Congress (and, presumably, the States) may declare that a person who is passively exposed to an abstract violation of law is entitled to a monetary recovery, that person also has sustained a sufficiently concrete and particularized injury to have standing to sue in the federal courts. Because removing injury from the equation also removes causation, the holding below not only reduces the three-part standing inquiry into a single-factor test, but also makes class certification much more likely. If the only issue that must be proved is an abstract violation of a legal duty, re-

gardless of its widely varying or entirely absent effects on individual class members, commonality under Rule 23(a)(2) and predominance under Rule 23(b)(3) would collapse into a single-issue inquiry.

Like petitioners here, the members of the *amici* count their customers in the thousands or even millions. The *amici* are subject to a wide variety of technical legal duties with respect to the marketing and service of motor vehicles, and the financing affiliates of some members are subject to technical requirements regarding consumer credit that resemble those at issue here.

If, for practical purposes, injury and therefore causation were no longer required elements for standing in the federal courts, the members of the *amici* may face class actions with members ranging from the tens of thousands to the millions, seeking annihilating damages for conduct that caused concrete and particularized harm to a handful of customers or none at all. That result would be as senseless and economically harmful as it is unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

The significance of the standing question before the Court extends far beyond the Real Estate Settlement Procedures Act (RESPA). RESPA and the state regulation of the services at issue help sharpen the focus: it is clear that the respondent was not, and could not have been, injured in any perceptible sense by the technical RESPA violation she asserts. Because the State set the price of the fungible services she bought, she indisputably received everything she paid for. And the remedial provisions of RES-

PA—which provide a full (and then trebled) refund under a one-way rescission theory under which the plaintiff keeps the consideration provided by the defendant, but the defendant loses the consideration *it* received three times over—heighten the economic significance of the standing issue, because a class might be (and in fact was ordered to be) certified without need to consider whether causation and actual injury could be established by class-wide common proof.

This case reflects a much wider trend, however, and one that has ensnared many members of the *amici* in high-stakes litigation against plaintiffs and putative class members who have sustained no harm. In those cases, as here, named plaintiffs propose a class consisting of all buyers of a product or service and assert a theory of liability that requires them to prove only their purchases and the defendant's conduct`. The theory is designed to obviate the need to show, as a precondition to certifying a class, that unified proof common to all class members can establish the existence and nature of a concrete and particularized injury to each class member, and that this injury was caused by a violation of legal duty by the defendant that provides a common ground for relief.

This theory of injury through abstract violation overturns fundamental principles of Anglo-American jurisprudence as well as constitutional standing doctrine. While the maxim *de minimis non curat lex* has fallen into disuse, the theory asserted here permits the judiciary to intervene when no one has been (or imminently will be) harmed at all. Presenting the antithesis of "no harm, no foul," the standing prin-

ciples embraced below make every legal misstep into a compensable injury.

Because a proponent of class certification need not demonstrate a means of establishing an abstract or nonexistent injury through common proof—as there is nothing to prove—the net result is drastic and absurd: the lesser the injury, the broader the class, the greater the damages exposure, and the larger the settlement. And that pay-off is deadweight economic loss, a wealth transfer that wildly overcompensates for a nonexistent injury and overdeters insubstantial regulatory violations, leading at best to wasteful expenditures aimed at punctilious compliance with trivial requirements.

Like others who provide goods or services to thousands or millions of consumers, the members of the *amici* are frequent targets of efforts to certify all-buyers (or all-owners) classes on no-injury theories quite similar to the class proposed in this case. Many of the actions asserted against the members of the *amici* involve representative plaintiffs who asserted individual injuries—a vehicle part claimed to have fallen short of warranty standards, or a representation that misled (or was misunderstood by) the named plaintiffs before their purchases.

Yet even when the proposed class representatives have alleged an injury to themselves, they do not seek to represent a class consisting only of those who also were injured. Rather, the named plaintiffs assert that the class properly consists of everyone who purchased the same vehicle, even those whose parts long outlasted the warranty period without incident, or who were not exposed to the challenged communication, did not understand it to mean what

a named plaintiff says it meant, or simply did not care about whatever may have been misrepresented.

Thus, if 3% of a model year's transmissions grind upon shifting, and the manufacturer (or the plaintiff's expert) later identifies a design or manufacturing change that could have reduced the failure rate, plaintiffs assert that every single buyer received a "defective" transmission because it was prone to problems even if they never manifested. Under this theory, a transmission that functioned normally throughout its warranty period or useful life entitles every buyer either to a payment for the vehicle's reduced value or to a recall and replacement at the manufacturer's expense.

Or if the plaintiff asserts an idiosyncratic view of an advertisement—believing, perhaps, that a safety feature absolved the driver from paying attention to certain road conditions—the plaintiff then maintains that a class can be certified, to include not only of buyers who shared that misunderstanding, but all who bought that safety system. All buyers, the theory goes, are entitled to measure whether the advertisement was misleading under a common, objective standard, and then collect some measure of damages or restitution—whether or not the absent class members saw the same advertisement, interpreted it the way the representative plaintiff did, or were motivated at all in deciding whether to purchase or what price to pay.

In the present case, of course, the asserted violation of legal duty did not harm even the representative plaintiff under any definition of "injury" that is not perfectly circular. Similar situations have arisen in litigation against automobile and other manufacturers. The best-known example is the litigation

against Toyota claiming that the unintended acceleration phenomenon that was initially reported to be involved in several accidents represents a violation of legal duty even as to the millions of buyers who have never experienced the phenomenon. Indeed, those claims have extended to buyers whose vehicles have been recalled and retrofitted in ways that, by all appearances, will prevent further instances of any unintended acceleration that may have occurred. The proposed classes *exclude* the handful of persons claiming to have been injured by unintended acceleration, and the classes are not limited to persons who claim to have experienced sudden unintended acceleration but were not involved in a collision. Rather, the proposed classes consist of persons whose vehicles never accelerated unintentionally and almost certainly never will.

The implications of such theories—which affirmance in this case would fuel—are staggering. Class certification would become nearly automatic if standing principles do not limit the members of a class to those who can assert actual injury from the alleged wrong. In that event, class certification could proceed without the need to show that common proof can establish both the fact of injury and causation of that injury by the allegedly unlawful conduct. Cases of formerly limited scope would present the possibility of annihilating damages. Every problem that affects a few, a few dozen or a few hundred vehicles—or alleged "violations" that have no tangible effects on any vehicles—would become compensable for thousands or millions of buyers.

This type of claim presents significant deadweight loss issues when each uninjured buyer stands to recover twenty dollars. But the exposure per buy-

er can reach the hundreds or thousands of dollars—as is easily the case for alleged issues with the more expensive systems in a vehicle, or when statutory damages are available. The present case appears to involve hundreds of millions, if not billions, in potential liability to persons who got everything they paid for. Similar, potentially annihilating exposure could arise in the lawsuits alleging violations relating to the manufacture, advertising, or sale of motor vehicles.

This Court should reaffirm the principle that only those actually injured in a concrete and particularized way may press their claims in federal court, whether as individuals or when swept into a certified class. The judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. Persons Who Are Unaffected By A Violation Of Legal Duty Lack Standing To Sue.

"Article III standing * * * enforces the Constitution's case-or-controversy requirement." *Daimler-Chrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (quoting *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004)). Standing has three familiar components: "First, the plaintiff must have suffered an injury-in-fact * * * . Second, there must be a causal connection between the injury and the conduct complained of * * * . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Arizona Christian School Tuition Organization* v. *Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted).

It long has been "settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997) (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 100 (1979)). Rather, "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Institute*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009).

The contrary principle would make no sense in a constitutional system of government. A constitutional limitation that can be conclusively satisfied by a legislative *ipse dixit* is no limit at all. The Ninth Circuit nonetheless equated the existence of a statutory remedy with the constitutional requirement of standing, even if—as is the case here—there is no possibility that a particular plaintiff (or any potential class member) was harmed by the allegedly unlawful conduct.

As this Court recently reiterated, however, injury-in-fact requires not only "an invasion of a legally protected interest," but one that is both "(a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." '" *Arizona Christian*, 131 S. Ct. at 1442 (quoting *Lujan*, 504 U.S. at 560). The decision below does away with *both* limiting factors, however, declaring that the mere invasion of *any* legally protected interest is enough so long as a remedy is available or can be devised: the remedy *ipso facto* equates with injury-in-fact.

In excusing a plaintiff from showing an *actual* injury-in-fact, the decision below necessarily excuses a showing of causation as well. Where the only injury arises from a violation of legal duty that had no ef-

fect on the plaintiff, there is nothing to cause, and thus no meaning to the "causal connection" that is otherwise required. *Arizona Christian*, 131 S. Ct. at 1442.

As a consequence, the three-part test of Article III standing—injury-in-fact, causation, and redressability—would collapse into the single question of redressability. Once a recognized remedy made an abstract complaint "redressable" in the sense that the plaintiff could seek and collect payment, anyone identified in a statute would have standing. That could be any buyer of a vehicle that had manifested a flaw only in the vehicles of a small subset of other buyers. Or it could be anyone who bought a vehicle that was advertised in a misleading way whether or not the buyer saw the ad, misunderstood the vehicle's characteristics as a result, or was motivated by that misunderstanding.

If the decision below stands, the mere violation of the legal duty would be sufficient for standing so long as the buyer had any attenuated connection to the violation. That is, the buyer's interest in a perfectly lawful transaction would be enough.

In determining whether the invasion of particular legal interests amounts to injury-in-fact, however, the Court has held that "the interest in seeing the law obeyed" is categorically insufficient. *FEC* v. *Akins*, 524 U.S. 11, 24 (1998). To the contrary, "[a] plaintiff must always have suffered a distinct and palpable injury to *himself*." *Gladstone*, 441 U.S. at 100 (emphasis added). No plaintiff can enforce every legal obligation that involves her in some way; she can "enforce" only those "specific legal obligations whose violation works a direct harm." *Allen* v. *Wright*, 468 U.S. 737, 761 (1984). That is, a plaintiff

has standing to sue an adjacent driver who sideswipes her, but not to sue the driver who is merely in her field of view when he makes an unsafe lane change.

A government (or court) cannot create Article III injury simply by declaring that an injury occurs whenever someone is exposed to some kind of statutory violation or other legal duty. A contrary holding would significantly alter the role of the federal courts and thus unsettle the constitutional balance between the three branches of government. The judiciary is the "least dangerous branch" precisely because it cannot intrude generally into the affairs of citizens or their government, much less at the instigation of private citizens who have suffered no harm from the conduct about which they wish to complain. The Federalist No. 78, at 402 (George W. Carey & James McClellan, eds., 2001) (Alexander Hamilton). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so" (*Cuno*, 547 U.S. at 341)—much less transferring huge sums from one private party to others on the basis of abstract violations that caused no tangible harm. Such judicial arrogations of power disregard "the proper—and properly limited—role of the courts in a democratic society." *Summers*, 129 S. Ct. at 1148 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)).

If the Ninth Circuit were correct, Congress (not to mention state courts and legislatures) could essentially dictate access to the federal courts by removing the independent force of the case-or-controversy limitation. The existence of a remedy would bootstrap into standing to pursue the remedy in federal court, because there would be no requirement of an actual

injury or a causal connection between that nonexistent injury and the defendant's violation of a legal duty. That would shunt aside this Court's standing jurisprudence in a substantial category of cases, a category prospectively limited in size only by legislative and judicial ingenuity. That is not what the Framers intended, nor what the Constitution allows.

II. Permitting Standing To Rest On A Harmless Breach of Legal Duty Would Have Severe, Deleterious Consequences In Class Action Litigation.

The constitutional disarray that affirmance would cause is sufficient to show that reversal is warranted. All doubt should be dispelled, however, by the broader consequences of a holding that would permit Congress to establish Article III standing by providing a remedy to persons who sustained no concrete harm from a violation of statutory or other legal duty.

A. Affirmance Would Entrench And Propagate The Novel Device Of The No-Injury Class Action By Excusing Common Proof—Or Any Proof—Of A Concrete, Particularized Injury-In-Fact And Its Causation.

1. A decision finding that all persons coming within the scope of a remedial statute necessarily have Article III standing could transform a current anomaly of class action practice into the norm. The *amici* and their members (among other mass-market businesses) increasingly are subject to class action claims purporting to encompass all buyers of a product and asserting, not that every buyer was misled by an advertisement or received a part that failed,

but that the value that each buyer received was somehow diminished by the fact that others were misled or received parts that malfunctioned.

The members of the all-buyers class, the plaintiffs in these cases claim, have in common the abstract injury with no manifestation (and certainly none that the plaintiffs care to prove). The theory is that a part that failed in 10% or 5% or 2% or even 0.01% of the vehicles of particular model years was also substandard as to the vast majority of vehicles where the part functioned without incident. Under that theory, no further injury need be proved so long as an expert can estimate the diminished value of the vehicles that functioned adequately through the warranty or other relevant period.

That is, buying the product in itself is injury-in-fact—and the only "injury" requiring proof—even if the product performs to expectations. The *Toyota Motor Corp. Unintended Acceleration Litigation*, ___ F. Supp. 2d ___, 2011 WL 1840555 (C.D. Cal. May 13, 2011), provides a prominent example of this approach. In that case, the plaintiffs assert that their vehicles lost value because of the publicity surrounding accidents involving others, the National Highway Traffic Safety Administration (NHTSA) findings and recalls, and the like, or that the plaintiffs (who do not intend to prove any defect in their own vehicles) would not have bought their cars if they had known about the problem of sudden unintended acceleration. The district court held that the "economic loss injury flows from the plausibly alleged defect." *Id.* at *10. That is, a defect that manifested in other vehicles can be equated with injury-in-fact and causation for vehicles where the claimed defect never appeared.

An analogous theory has been advanced as to false advertising claims. Plaintiffs may assert that they were misled by statements in advertisements, labels, web sites, or sales brochures. They sometimes advance a theory of such striking idiosyncrasy that it would be impossible to prove that a significant number of buyers—much less all of them—either understood the statement in the way the plaintiffs did, or treated the information as material.[2] These cases often rely on state consumer protection law to use an objective "reasonable consumer" standard not only to establish whether statements were unlawfully deceptive or misleading, but also whether individual plaintiffs, including absent class members, relied on the misstatements and were actually injured. See *Yokoyama* v. *Midland National Life Ins. Co.*, 594 F.3d 1087, 1092 (9th Cir. 2010) (construing Hawaii law). These actions seek a common recovery of some discount from the purchase price—a remedy that, when extended to every buyer, becomes huge.

These no-injury/diminished value class actions represent counsel's efforts to avoid having to demonstrate common means of proving causation and in-

---

[2] See, *e.g.*, *Mazza* v. *American Honda Motor Co.*, 254 F.R.D. 610 (C.D. Cal. 2008), revised, 2009 WL 6025547 (C.D. Cal. Jan. 8, 2009), appeal pending, No. 09–55376 (Ninth Cir. argued June 9, 2010) (plaintiffs allege in part that they were misled by advertising they took to mean that all three stages of a warning and braking system would deploy in series rather than skipping ahead to stop the vehicle when a collision was imminent; nationwide all-buyers class certified); *Chavez* v. *Blue Sky Natural Beverage Co.*, 268 F.R.D. 365 (N.D. Cal. 2010) (expatriate New Mexican contends that small-type reference to New Mexico on label for nationally distributed soft drink bottled in California deceived him into buying beverage in order to support business in his home state; nationwide all-buyers class certified).

jury (let alone damages) class-wide by taking those issues out of the case: they claim that a cognizable injury results from the violation of a legal duty, an intangible injury that by definition is common to every buyer of a product.

Currently, most (but not all) of these cases involve class representatives who experienced some tangible harm even though they don't want to have to provide common proof for the absent class members. That is, the putative class representative claims to have been misled by an advertisement, or claims that his brakes or tires wore out too early.

If the decision below is correct, however, it would be unnecessary to find even an injured class representative. It would suffice to convince a court to declare that a violation *ipso facto* injures everyone who bought a vehicle that was featured in an advertisement, or that contained a part or system that allegedly did not meet some measure of quality. But standing does not extend to permit private plaintiffs to "enforce [any] specific legal obligations" to which they bear some relation, but only those "whose violation works a direct harm" to the plaintiffs themselves. *Allen* v. *Wright*, 468 U.S. at 761.

2. The elimination of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement—would remove one of the principal limits on the certification of no-injury classes. Several courts of appeals have recognized that buyers who were not actually injured by an unlawfully misleading ad would have no standing to pursue actions on their own. Accordingly, those persons cannot be included in a class, because class certification cannot expand substantive rights. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

As a consequence, under current law, a class in federal court must be defined so that all of its members have suffered actual injury, or at least so that the presence or absence of injury-in-fact and causation can be determined using common proof and thus "can be productively litigated at once." *Dukes*, 131 S. Ct. at 2551. Conversely, no class may be certified irrespective of whether its absent members have sustained actual injury—or irrespective of whether actual injury is subject to common proof. As one court put it, "no class may be certified that contains members lacking Article III standing." *Denney* v. *Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); see *Avritt* v. *Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (same); *Oshana* v. *Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (certification improper when "[c]ountless members of [the] putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception"). Nor can a class be defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct." *Kohen* v. *Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009).

Other courts of appeals have rejected similar theories. Thus, the Eighth Circuit refused to allow purchasers of a recalled crib to recover the cost of their purchase under a contract theory when their cribs had not yet exhibited the alleged defect. See *O'Neil* v. *Simplicity, Inc.*, 574 F.3d 501, 504 (8th Cir. 2009). And the Fifth Circuit rejected a class seeking reimbursement of money spent on a drug that had harmed others, but not the class members, on the ground that "[m]erely asking for money does not establish an injury in fact." *Rivera* v. *Wyeth-Ayerst Labs.*, 283 F.3d 315, 319–20 (5th Cir. 2002). The decision below in the present case, however, suggests

that "asking for money" may well enough to establish constitutional standing.

Many more no-injury class actions have arisen in the motor vehicle setting. Although standing has not been the only line of defense against ruinous liability exposure to overbroad classes full of uninjured buyers, many of the court of appeal decisions rejecting such actions have relied on related state-law principles of causation and injury (which, of course, can be changed by state legislatures or courts). Those decisions have held either that a proposed class improperly included uninjured parties, or that too many individualized issues prevented class-wide resolution of issues such as causation an injury "in one stroke." *Dukes*, 131 S. Ct. at 2551.

For example, the Seventh Circuit decertified a nationwide class action seeking recovery for economic loss for allegedly defective tires. See *In re Bridgestone/Firestone Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002). Noting that "these persons seek compensation for the *risk* of failure, which may be reflected in diminished resale value of the vehicles and perhaps in mental stress" (*id.* at 1015), the court of appeals noted that their theory was infirm as a matter of bedrock common law: "No injury, no tort, is an ingredient of every state's law." *Id.* at 1017.

Other courts have agreed. The Eighth Circuit affirmed dismissal of an action alleging antilock braking systems had performance problem that had caused no tangible injury because diminished value theory was "too speculative." *Briehl* v. *General Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999). The Fifth Circuit affirmed the denial of certification to a putative class of car buyers alleging that a defect in a

safety module had caused unexpected side air bag deployments for a small number of other buyers; the manufacturer had recalled and offered to replace the module for everyone else. See *Cole* v. *Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007). The plaintiffs nonetheless asserted that the breach of a duty to provide risk-free safety systems had harmed them between the time they bought their vehicles until the time the modules were replaced, even though plaintiffs' own modules had never malfunctioned. Yet the Fifth Circuit held that this no-injury class *had* standing, though it rejected class certification on other grounds. Likewise, the D.C. Circuit accepted the legitimacy of a warranty class of owners who never experienced the experienced the sudden shifts into reverse for which they sought a recovery. *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986) (vacating and remanding class certification on other grounds). Cf. *DaimlerChrylser Corp.* v. *Inman*, 252 S.W.3d 299, 300 (Tex. 2008) (dismissing "no injury" suit based on allegedly defective seatbelt buckles that might release unintentionally where "[t]wo of the plaintiffs have never experienced anything like what they claim might happen, and the third is not sure whether he has or not, but he has never been injured").

3. The cases discussed above reflect the persistent efforts of class-action plaintiffs to inflate the size and settlement value of what should be modest disputes. Indeed, plaintiffs have succeeded in obtaining class certification on theories of this kind in several cases. For example, in *Wolin* v. *Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010), a case addressing an alignment flaw that accelerated tire wear, the Ninth Circuit accepted a diminished-value theory of liability that extended warranty

terms into perpetuity by providing relief for latent defects that do not (or may not) manifest until after the warranty period expires. That theory, the court of appeals held, sufficed both to show actual injury and to render a broad range of individualized circumstances (and individualized defenses) irrelevant. *Id.* at 1173–1174.

Similarly, in *Daffin* v. *Ford Motor Co.*, 458 F.3d 549 (6th Cir. 2006), a plaintiff alleged that a defect in his van's throttle body assembly caused the accelerator to stick. *Id.* at 550. Although the alleged defect would not cause accelerator problems in the vast majority of vans, and unintended acceleration could result from numerous other issues—such as driver error—the court nonetheless affirmed the certification of a class of all van purchasers on a diminished-value theory. *Id.* at 554. See also, *e.g.*, *Chamberlan* v. *Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (denying leave to appeal class certification, on a diminished-value theory, of claim that alleged defect in manifold might lead to coolant leaks in some vehicles).

Decisions of this kind—rendering the injury and standing of individual absent class members irrelevant—permit any court to make this Olympian determination on a class-wide basis: that any issue that has manifested on any subset of vehicles is a "defect" that violates a legal duty as to all buyers and therefore provides a basis for warranty or other recovery for the vast majority of vehicle owners who have experienced no consequences.

That is the type of determination that standing doctrine seeks to remove from the federal courts. Threshold issues of standing must either be obviously satisfied for all members of a proposed class, or subject to reliable and dispositive common proof.

Just as "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims," *Dukes*, 131 S. Ct. at 2561, no class can be certified on the premise that the defendant will be unable to challenge the standing of individual class members who sustained no concrete and particularized injury from the alleged violation of law.

Affirmance here, however, would make it unnecessary in many cases to separate the potentially injured from the set of all customers. So long as a court perceived that a statute (or common-law doctrine) afforded a remedy to all persons with any identifiable connection to a violation of legal duty—not just those who sustained an actual injury caused by the violation—the set of all customers would be co-extensive with a class. Most important, class certification might become nearly automatic, since the fact of a violation would remove all need to show that causation and injury were subject to common proof. See Pet. App. 8a–11a (reversing denial of class certication in present case).

B. Affirmance Would Make Causation And Injury Irrelevant To Standing Or Class Certification Whenever A Court Or Legislature Desired That Result.

Past experience provides a muted vision of the consequences were this Court to open federal courthouse doors to plaintiffs seeking monetary compensation for violations of legal duty that did not cause concrete and particularized harm to the plaintiffs themselves. Some legislatures almost certainly would respond by enacting (and courts eagerly construing) additional causes of action that could be supported solely by an attenuated connection to a vi-

olation of legal duty. The political temptation to create standing by *ipse dixit* often would be strong.

The Ninth Circuit and California predictably provide a cautionary example. California formerly recognized the right of any citizen to sue on behalf of the general public for an injunction, attorney's fees, and a lump-sum restitutionary award under the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*), and the related False Advertising Law (*id.* § 17500 *et seq.*) (collectively "UCL"). his Court and the Ninth Circuit agreed that such persons lacked standing to pursue relief in federal court. See *Nike Inc.* v. *Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal as improvidently granted); *Lee* v. *American National Ins. Co.*, 260 F.3d 997, 1001-02 (9th Cir.2001)).

California voters subsequently imposed standing requirements on private UCL plaintiffs that are even stricter than those required by Article III, and limited private representative actions to those that satisfy normal class certification standards. But the California Supreme Court held in the *Tobacco II Cases*, 46 Cal. 4th 296 (2009), that the statutory actual injury requirement extends only "to the class representatives, and not all absent class members." *Id.* at 306. At least at the threshold, absent class members can pursue their claims in California state courts without having standing at all.[3]

---

[3] The California Supreme Court relied for its view of Article III standing on *Vuyanich* v. *Republic National Bank*, 82 F.R.D. 420 (N.D. Tex. 1979). See *Tobacco II*, 46 Cal. 4th at 319. But the district court decision in *Vuyanich* applied an across-the-board analysis that this Court pointedly rejected in *General Telephone Co.* v. *Falcon*, 457 U.S. 147 (1984)—and as a consequence the

The California courts have divided over whether *Tobacco II* extends beyond the setting of standing to make it unnecessary to establish that injury, causation, or restitution are susceptible to common proof, on the theory that all of those elements may be presumed. *See Avritt*, 615 F.3d at 1035 (collecting cases). And the Eighth Circuit, considering a class action asserting California law, has held that, "to the extent that *Tobacco II* holds that a single injured plaintiff may bring a class action on behalf of a group of individuals who may not have had a cause of action themselves, it is inconsistent with the doctrine of standing as applied by federal courts." *Ibid.*

The Ninth Circuit, however, has expressed no doubt that California law under *Tobacco II* permits recovery by uninjured class members—and suggested that the federal courts may entertain class actions brought on behalf of class members who would lack standing to sue individually and for whom injury, causation, and the extent of relief could not possibly be resolved "in one stroke," as this Court put it in *Dukes*, 131 S. Ct. at 2551.

In *Stearns* v. *Ticketmaster Corp.*, __ F.3d __. 2011 WL 3659354 (9th Cir. Aug. 22, 2010), the Ninth Circuit reversed a district court's denial of certification of a class of all purchasers of an online discount coupon and cashback award service who did not use the service they purchased. The plaintiffs contended that the sign-up process was deceptive, but they proposed no way of determining through common proof

---

Fifth Circuit "vacated and remanded" the class certification "for reconsideration of the proper class in light of *Falcon*." *Vuyanich* v. *Republic National Bank*, 723 F.2d 1195, 1200 (5th Cir. 1984). That is, *Tobacco II*'s passing reference to federal law relied on a reversed decision that used a long-discredited analysis.

who had been deceived and who intended to buy the service—that is, which class members were injured and which received only what they wanted, but simply never used it. The court of appeals held that such proof was unnecessary under *Tobacco II*.

More important, although *this* Court had held only four months earlier that Article III standing requires "a causal connection between the injury[-in-fact] and the conduct complained of" (*Arizona Christian*, 131 S. Ct. at 1442), the Ninth Circuit held that Article III was consistent with the conclusion that "it need not be shown that class members have suffered actual injury in fact connected to the conduct of the [defendants]." *Stearns*, 2011 WL 3659354, at *5. In the Ninth Circuit's view, the class members had shown actual, concrete and particularized injury merely because each member had bought the service and thus "was relieved of money in the transactions." *Ibid.* Under that logic, any purchaser of any product has demonstrated injury-in-fact (or his class representative can demonstrate that element *en masse*) merely by virtue of the purchase itself, even if the buyer (or class members) received everything expected.

As for causation, the Ninth Circuit concluded that the "loss" (*i.e.*, the purchase) was "fairly traceable to the action of the [defendants] *within the meaning of California substantive law*." *Ibid.* (emphasis added). The Ninth Circuit did not acknowledge *this* Court's requirement of a "causal connection" for standing purposes. See *Arizona Christian*, 131 S. Ct. at 1442. "[A]ny connection" was enough. *Stearns*, 2011 WL 3659354, at *5. That seriously dilutes the federal law of causation. As the Court explained in another context, "[t]o touch upon a loss is not to

cause a loss, and it is the latter that the law requires." *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 343 (2005).

The Ninth Circuit flaunted its refusal to apply this Court's standing analysis: defendants' "real objection," the court of appeals maintained, "is that state law gives a right to 'monetary relief to a citizen suing under it' (restitution) without a more particularized proof of injury and causation." *Stearns*, 2011 WL 3659354, at *5 (citation omitted). Yet it is the availability of "particularized proof of injury and causation" that separates the claims that may be pressed in federal court from those that cannot.

The court of appeals concluded its standing analysis by holding that all members of a certified class had "class standing" so long as one named plaintiff had standing. *Ibid.* But the circuit jurisprudence that the *Stearns* court cited as support in fact answered a different question. It is true that one named plaintiff with standing is enough to keep a class action in court long enough for the plaintiff with standing to *pursue* class certification.

But class certification analysis cannot be so cavalier. A class action can aggregate only claims that could be presented individually (setting aside jurisdictional amounts and the like). Certification cannot provide individuals a right to relief in federal court that the Constitution would deny them if they sued individually. That result would violate the Rules Enabling Act because it would "enlarge or modify a[] substantive right" that would not exist in the absence of class certification under Rule 23. See *Dukes*, 131 S. Ct. at 2561 (quoting 28 U.S.C. § 2072(b)).

Stearns shows how easily undue relaxation of standing requirements could produce class actions with few discernible limits. But even the *Stearns* court recognized that there might be some limits to certification in cases where there was "no cohesion among the members because they were exposed to quite disparate information from various representatives of the defendant." 2011 WL 3659354, at *5. Affirmance here might remove even those limits, and could make class certification decisions like *Stearns* commonplace throughout the Nation.

C. Diluting the Injury-In-Fact Requirement Would Exacerbate The Problem Of Annihilating Damages For Harmless Violations of Law.

For companies with many customers or mass-market products, technical violations of law would present the risk of annihilating damages for conduct that actually harmed nothing but the sensibilities of a judge or legislative drafter. As this Court has repeatedly recognized, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). This Court and "[o]ther courts have noted the risk of 'in terrorem' settlements that class actions entail." *Ibid.* (citing *Kohen*, *supra*); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975); "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.'" *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dis-

senting) (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments).

The present case provides a stark example, with a putative nationwide class seeking treble the amount paid for title insurance which (if respondent's payment was typical) could amount to a total of $2,000 or more per class member. Another recent decision from the Ninth Circuit further illustrates the risks. In *Bateman* v. *American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), a putative class of plaintiffs alleged that the defendant had violated the Fair and Accurate Credit Transactions Act ("FACTA") by printing more than the last five digits of a consumer's credit or debit card numbers on electronically printed receipts. The named plaintiff did not contend that he or any other class member suffered any identity compromise or other injury as a result of the defendant's conduct. Yet the class sought statutory damages ranging from $100 to $1,000 for each willful violation of FACTA, so that—after the Ninth Circuit reversed the denial of class certification—the defendant's potential liability fell between $29 million and $290 million, *id.* at 710, for conduct that caused no harm. And the Fair Credit Reporting Act (FCRA) presents similar issues—issues that, like those under FACTA, may reach the financing affiliates of the members of the *amici*. See *Murray* v. *GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) (1.2 million-member FCRA class seeking statutory damages of $100 to $1000).

If purchase of a product or service itself is sufficient injury-in-fact, and causation drops out of the analysis, recoveries that may be modest as to each consumer—and would remain modest if applied only to consumers who were harmed by the conduct—

could quickly reach gigantic and annihilative proportions. That is another reason that this Court should continue to apply a principled limitation to the standing of private plaintiffs.

D. Affirmance Would Increase The Risk Of Judicial Intrusion Upon NHTSA's Prerogative To Determine Which Safety Risks Warrant Recalls Of Vehicles That Have Not Manifested Dangerous Defects.

Affirmance of the Ninth Circuit's expansive view of actual injury would have additional adverse effects impinging on the constitutional separation of powers. For decades, plaintiffs have invoked a range of legal theories on behalf of not-yet-injured plaintiffs in an effort to induce a court to order product-wide safety recalls of vehicles that have not manifested any defects, based on alleged safety issues with other vehicles of the same model year and configuration. That is, uninjured parties seek to substitute the discretion of a trial court—or a jury—for that of NHTSA in making the determination which risks warrant the expense of a recall and repair.

Some courts have held that the Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*, preempts the use of state law to effect a safety recall, or at least renders a superior forum to a private class action. See, *e.g.*, *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, 153 F. Supp. 2d 935, 944 (S.D. Ind. 2001) *Bussian* v. *DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 629 (M.D.N.C. 2006); *Lilly* v. *Ford Motor Co.*, 2002 WL 84603, at *5 (N.D. Ill. 2002); *Namovicz* v. *Cooper Tire & Rubber Co.*, 225 F. Supp. 2d 582, 584 (D. Md. 2001); *American Suzuki Motor Corp.* v. *Superior Court*, 37 Cal. App. 4th 1291

(1995). But other courts permitted private plaintiffs to seek to initiate a safety recall, or at least broaden the scope of an existing NHTSA recall, using a class action. *See, e.g.*, *Toyota Motor Corp. Unintended Acceleration Litigation*, 754 F. Supp. 2d 1145, 1194–1199 (C.D. Cal. 2010); *Chamberlan* v. *Ford Motor Co.*, 314 F. Supp. 2d 953 (N.D. Cal. 2004); *Kent* v. *DaimlerChrysler Corp.*, 200 F. Supp. 2d 1208 (N.D. Cal. 2002); *Anthony* v. *General Motors Corp.*, 33 Cal. App. 3d 699 (1973).

If parties without a concrete injury have standing, similar classes are more likely to be certified and relief more likely to be granted. That would work a substantial intrusion on the expertise-driven jurisdiction of NHTSA, creating parallel regulatory regimes administered *ad hoc* by "non-expert judges [who] review highly technical matters on the basis of a record prepared by lawyers, not scientists," and whose determinations in some cases may be founded on jury factual findings with their "random, lottery-like results." Stephen Breyer, Breaking the Vicious Circle 49, 59 (1993). That situation would cause chaos within an automobile industry that could be subjected to much more frequent recalls ordered under varying standards and far greater, wholly unpredictable costs of compliance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD M. FALK
Counsel of Record
Mayer Brown LLP
Two Palo Alto Square
Suite 300
Palo Alto, CA 94618
(650) 331-2000
dfalk@mayerbrown.com
Counsel for Amici Curiae

AUGUST 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 18 2011
OFFICE OF THE CLERK

No. 10-708

In The

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF BIRNY BIRNBAUM, M.S., M.C.P.; JOSHUA FISCHMAN, J.D., PH.D.; AND ROBERT E. LITAN, J.D., M. PHIL., PH.D. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

SHELLEY R. SADIN
ZELDES, NEEDLE & COOPER
A PROFESSIONAL CORPORATION
1000 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
E-Mail: ssadin@znclaw.com

Counsel of Record for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Interest of *Amici Curiae* 1

Summary of the Argument 2

The Argument 3

I. ECONOMIC ANALYSES SHOW THAT CONSUMERS OF TITLE INSURANCE ARE HARMED WHEN FIRMS PROVIDE OR ACCEPT RECOMPENSE NOT FOR WORK PERFORMED BUT FOR CUSTOMER REFERRALS 3

A. Basic Economic Theory Explains Why Payments Solely For Customer Referrals Harm Consumers 3

B. Payments Solely For Customer Referrals Harm Consumers Of Title Insurance 6

C. The HUD-VA Study 9

D. RESPA 11

E. Peat Marwick Study 12

F. RESPA Amendments 14

G. Subsequent Studies 14

II. IF, AS SHE CLAIMS, RESPONDENT PURCHASED TITLE INSURANCE ENCUMBERED BY A BANNED CUSTOMER REFERRAL AGREEMENT, THEN SHE SUFFERED A DIRECT ECONOMIC INJURY 17

Conclusion 18

TABLE OF AUTHORITIES

Page

CASES:

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 6

CONSTITUTION, STATUTES AND RULES:

U.S. Const. art. III, § 2 2

Anti-Kickback Statute, amendment to Medicare and Medicaid Patient Protection Act, 42 U.S.C. § 1320-7b 5

Clayton Antitrust Act, 15 U.S.C. §§ 12-27 ..... 5, 6

Federal Trade Commission Act, 15 U.S.C. §§ 41-58 5

Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601 *et seq.*) ..... *passim*

Stark Law, amendment to the Social Security Act, 14 U.S.C. § 1395nn 5

LEGISLATIVE MATERIALS:

Mortgage Settlement Costs: Hearings on S. 3164 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs, 92d Cong. (1972) 11, 12

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings on H.R. 13337 Before the Subcomm. on Housing of the H. Comm. on Banking and Currency, 92d Cong. (1972) 9, 10, 11, 12

TABLE OF AUTHORITIES – Continued

Page

Real Estate Settlement Costs: Hearing on H.R. 9989 Before the Subcomm. on Housing of the H. Comm. on Banking and Currency, 93d Cong. (1973, 1974) 11

Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance, and Urban Affairs, Ser. No. 97-24, 97th Cong. (1981) 7, 8, 14

OTHER MATERIALS:

American Land Title Association, *Market Share Detail by Family Company Summary, 4th Quarter,* http://www.alta.org/industry/financial.cfm (last visited Oct. 16, 2011) 6

Peat, Marwick, Mitchell & Co., *Real Estate Closing Costs: RESPA, Section 14a* (Oct. 1980) 12, 13, 14

Report of Dep't of Housing and Urban Dev. and Veteran's Admin. on Mortgage Settlement Costs (March 1972) 9, 11

Report to the California Insurance Commissioner: *An Analysis of Competition in the California Title Insurance and Escrow Industry* (Dec. 2005) 7, 8, 15

TABLE OF AUTHORITIES – Continued

Page

Report to the Ranking Member, H.R. Comm. on Financial Services: *Title Insurance: Actions Need to Improve Oversight of the Title Industry and Better Protect Consumers* (Apr., 2007) 14, 15, 16

Robert W. Hahn, Robert E. Litan, and Jesse Gurman, *Bringing More Competition To Real Estate Brokerage,* 35 Real Est. L. J. 86 (2006) 4, 17

Samuelson and Nordhaus, *Economics* (19th ed., McGraw-Hill/Irwin, 2009) 4

Wash. State Office of the Ins. Comm., *An Investigation into the Use of Incentives and Inducements by Title Insurance Companies* (Olympia, Wash., Oct. 2006) 15

INTEREST OF *AMICI CURIAE*

Amici curiae are economists who collectively have written, taught and consulted about economic and public policy issues including antitrust policy, and provided economic analyses of federal and state statutes and regulations, including the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601 *et seq.*) ("RESPA").[1] *Amici* have spent their careers studying and promoting analytical and balanced approaches to economic issues, including a broad range of matters affecting businesses and consumers.[2]

Amici offer this brief to make the following point: whatever the merits of the debate about Respondent's standing as a matter of law, as a matter of economics, if – as she claims – Respondent purchased title insurance from Petitioner First American Title Insurance Company ("First American") that was encumbered by an illegal referral agreement between First American

---

[1] The parties' written consents to the appearance of *amici curiae* are on file with the Clerk's Office. Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel and *amici* are the sole authors of this brief, and that no person or entity other than counsel and *amici* contributed monetary support to this brief's preparation and submission.

[2] *Amici* are, in alphabetical order: Birny Birnbaum, M.S., M.C.P., Executive Director, Center for Economic Justice; Joshua Fischman, J.D., Ph.D., Associate Professor of Law and Economics, University of Virginia School of Law; and Robert E. Litan, J.D., M. Phil, Ph.D., Vice President, Research and Policy, Ewing Marion Kauffman Foundation, and Senior Fellow, Economics Studies Program, The Brookings Institution.

and Tower City Title Agency, LLC ("Tower City"), then she suffered a direct and concrete economic injury.

Amici do not attempt to construe RESPA, interpret Article III, § 2 of the United States Constitution, or assess the relative strengths or weaknesses of the parties' legal claims. *Amici* do not address, nor do they understand this case to present, the question of what is the best approach to stopping anticompetitive behavior in the title insurance market. Rather, *amici* offer an economic view of Respondent's claim of injury in the hope that it will assist the Court.

SUMMARY OF THE ARGUMENT

It is a matter of basic economic theory that kickback agreements – under which one firm provides recompense to another not for services rendered but solely in exchange for customer referrals – reduce competition, inflate prices, and harm consumers. It is a matter of fact, established by numerous empirical studies, that in the title insurance industry such referral agreements, (which violate RESPA's anti-kickback provisions), are widespread, inflate prices, and harm consumers of title insurance.

Consistent with the effect they have in other markets, kickback agreements in the title insurance industry raise the prices that consumers must pay above those that would occur in a competitive market. Inflated prices include not just legitimate costs of providing title services, but also illegitimate costs of illegal referral agreements.

If, as she claims, Respondent purchased title insurance encumbered by an illegal referral agreement between First American and Tower City, then – like any other consumer who purchased a policy issued pursuant to the banned agreement – Respondent paid an inflated price which included not just legitimate costs of providing title services, but illegitimate costs of the illegal referral agreement. For the very reasons that the referral agreement is banned by RESPA, (anticompetitive referral agreements inflate title insurance prices above those that would occur in a competitive market and harm consumers), if Respondent purchased a policy encumbered by that illegal agreement, then she suffered a direct and concrete economic injury.

THE ARGUMENT

I. ECONOMIC ANALYSES SHOW THAT CONSUMERS OF TITLE INSURANCE ARE HARMED WHEN FIRMS PROVIDE OR ACCEPT RECOMPENSE NOT FOR WORK PERFORMED BUT FOR CUSTOMER REFERRALS

A. Basic Economic Theory Explains Why Payments Solely For Customer Referrals Harm Consumers

Whether they are called kickbacks, referral agreements or some other name, payments in exchange

not for services rendered, but solely in exchange for referrals of business, have a long history of harming consumer welfare. Consumers do not influence kickback agreements, and often do not even know about them, so firms feel free to pass along the costs of such agreements to consumers without feeling obliged to improve or even maintain the quality of the product or service being provided. Kickback agreements prompt firms to put their interests before consumers', increase prices above those that would occur in a competitive market, and tend to decrease the quality of products and services.[3]

It is a matter of basic economic theory that kickback agreements interfere with market competition and harm consumers. In a perfectly competitive market, sellers offer essentially the same goods or services, cannot affect price, and must compete with each other and with potential new market entrants for consumers who are informed and thus can comparison shop. *See generally*, Samuelson and Nordhaus, *Economics* (19th ed., McGraw-Hill/Irwin,

---

[3] Payments made by one firm to another solely for the purpose of obtaining business referrals are not the same as rebates paid directly or indirectly to customers. The former tend to increase costs and decrease quality, while the latter tend to "improve efficiency by putting pressure on [firms] to provide better services at lower prices." *See* Robert W. Hahn, Robert E. Litan, and Jesse Gurman, *Bringing More Competition To Real Estate Brokerage*, 35 Real Est. L. J. 86, 107 (2006) (suggesting states consider lifting bans on brokerage firm rebates to customers).

2009). In this ideal free market, efficiency and public welfare are maximized. Markets are never perfectly competitive of course, but consumer welfare is best served by increasing price competition and decreasing barriers to market entry.

Kickback agreements lower price competition and raise barriers to market entry. Rather than appealing to consumers based on price and quality, firms appeal to those with the ability to refer business by paying referral fees or providing other consideration. Where business is locked up because of referral relationships, firms need not lower prices in order to obtain business; indeed, they can increase prices in order to pass along the cost of the referral payments to consumers. Kickback agreements operate much like anticompetitive horizontal agreements: rather than competing for customers on the basis of price and quality, firms pay each other to lock up consumer business – and divide up the market. These relationships also create barriers to market entry: firms that do not have established relationships are at a competitive disadvantage.

For these reasons, kickbacks are banned by federal laws ranging from the Clayton Antitrust and Federal Trade Commission Acts of 1914 to the Anti-Kickback Statute of 1987 and Stark Law of 1989. 15 U.S.C. §§ 12-27; 15 U.S.C. §§ 41-58; 42 U.S.C. § 1320-7b; 42 U.S.C. § 1395nn. Many anti-kickback laws include treble damages provisions which were created "for the purpose of encouraging private challenges to antitrust violations," including "class

actions . . . brought by retail consumers." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979).

In *Reiter*, this Court held that the petitioner in a class action who "allege[d] a wrongful deprivation of her money because the price of [the product] she bought was artificially inflated by reason of respondents' anticompetitive conduct," had "alleged an injury in her 'property'" under the Clayton Act. *Id.* at 342.

B. Payments Solely For Customer Referrals Harm Consumers Of Title Insurance

The title insurance industry has particular features which make the harmful effects of anticompetitive referral agreements especially problematic. The title insurance industry is highly concentrated: since 2008, four title insurance groups have accounted for 90% of premiums written nationwide. In Ohio, these four insurers have controlled 95% of the market since 2008.[4] Where only a few sellers control

---

[4] The top four title insurers, (Fidelity National Title Insurance Company, First American, Stewart Title Guaranty Company, Old Republic National Title Insurance Company), had a combined countrywide market share of 89.1% in 2010; 91.7% in 2009; and 92.2% in 2008. In Ohio, the four title insurers' combined market share was 94.9%, 95.8% and 96.1% in 2010, 2009 and 2008, respectively. American Land Title Association, *Market Share Detail by Family Company Summary, 4th Quarter*, http://www.alta.org/industry/financial.cfm (last visited Oct. 16, 2011).

most of the market, they have greater market power than they would in a more competitive market. Where only a few sellers control most of the market, they can (and usually do) inflate prices over what consumers would pay in a competitive market.

Consumers are required to buy title insurance when they purchase a home, making demand inelastic. *Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance, and Urban Affairs*, Ser. No. 97-24, at 230-31, 97th Cong. (1981) ("1981 House Hearings"); Report to the California Insurance Commissioner: *An Analysis of Competition in the California Title Insurance and Escrow Industry*, at 2, 70 (Dec. 2005) ("California Study," conducted by *amicus* Birny Birnbaum). Consumers purchase homes only infrequently in their lifetimes, have little experience with title insurance, and are ill equipped or disinclined to comparison shop. Consequently, consumers tend to use the title insurer recommended by the service provider who handles the closing (and likely has a referral relationship with the title insurance firm). 1981 House Hearings, at 232; California Study, at 29.

Since title insurance is only a small part of a real estate transaction, even if home buyers have enough information to compare title insurance prices, (and generally they do not), they are unlikely to hold up a

closing to bargain over the title policy price. The party with the market power in the title insurance industry is not the consumer, (which is how it should be in a competitive market), but the service provider (real estate broker, attorney, lender) in a position to refer business to the title insurer.

Firms therefore compete by appealing not to consumers based on price and quality, but to those with ability to refer business through referral fees and other consideration. 1981 House Hearings, at 232 ("This is the phenomenon of reverse competition."); California Study, at 92 (same). Competition is further hampered because referral relationships raise barriers to market entry: "existing firms with established relationships to the referrers of title insurance business have a significant competitive advantage over new entrants who do not possess such relationships." California Study, at 69.

Illegal referral agreements between title insurance firms and other service providers inflate title insurance prices above those that would occur in a competitive market; the inflated prices include not just legitimate costs of providing title services, but also illegitimate costs of illegal referral agreements. Consumers who pay prices inflated by illegal kickback agreements suffer actual and direct economic harm.

State rate regulation does not protect consumers from inflated title insurance prices because state rates are themselves based on inflated prices. State rating statutes and regulations cannot protect consumers from price inflation caused by anticompetitive conduct that affects the entire market.

Comprehensive empirical studies of the real estate settlement services industry conducted in the early 1970's and early 1980's confirmed that, not just in theory but in fact, consumers of title insurance were being harmed by the widespread use of agreements between firms to provide or accept recompense not for services rendered but for customer referrals. It was in the wake of these studies that Congress passed RESPA in 1974 and amended it in 1983. *See* Pub. L. No. 93-533, 88 Stat. 1724, (codified as amended at 12 U.S.C. §§ 2601 *et seq.*).

C. The HUD-VA Study

In 1970, Congress directed the Department of Housing and Urban Development ("HUD") and the Veterans' Administration ("VA") to study the costs involved in residential real estate closings; the agencies reported their results in 1972 ("HUD-VA Study"). *See* Report of Dep't of Housing and Urban Dev. and Veteran's Admin. on Mortgage Settlement Costs (March 1972), *reprinted in Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings on H.R. 13337 Before the Subcomm. on Housing of the*

H. Comm. on Banking and Currency, 92d Cong., at 735-1324 (1972) ("1972 House Hearings").

The HUD-VA Study involved a comprehensive and direct review of the real estate settlement services market nationwide. All local HUD and VA offices were directed to collect 10% (some smaller offices with lower volume used a larger percentage) of the closing statements in single family, owner occupied home purchases. *Id.* at 737, 769. Settlement costs were assessed using a statistical technique appropriate to studying costs compiled from a number of different populations. *Id.* at 775. Cost data were reviewed together with information about recording procedures and title insurance practices collected from twelve representative cities by The American University of Washington D.C., which was retained for the purpose. *Id.* at 738.

The HUD-VA Study found that real estate settlement costs were "unnecessarily high" and often did "not relate to work performed." *Id.* at 752; *see id.* at 739. There were a number of reasons for this, including that rather than competing for business by appealing to consumers with lower prices or better service, title insurance firms paid other service providers (like real estate brokers and lawyers) to refer consumer business to the title firms. *Id.* at 739, 751-52. Title firms used "an elaborate system of referrals, kickbacks, rebates, commissions and the like." *Id.* at 739. "These practices [were] widely employed," and "rarely inure[d] to the benefit of the home buyer." *Id.*

(referral fee system "generally increase[d] settlement costs" without benefiting consumers).

The HUD-VA Study found that excessive costs were not kept in check by state rating statutes, regulations and agencies: while many states provided varying degrees of oversight to prices for title insurance, state rate regulation was "largely ineffective." *Id.* at 738. This is hardly surprising since rates were themselves based on an inflated market.

D. RESPA

After conducting hearings at which it considered the HUD-VA Study and other evidence, Congress passed RESPA in 1974. Pub. L. No. 93-533, 88 Stat. 1724; 1972 House Hearings; *Mortgage Settlement Costs: Hearings on S. 3164 Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong. (1972) ("1972 Senate Hearings"); *Real Estate Settlement Costs: Hearing on H.R. 9989 Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 93d Cong. (1973, 1974). Both the original and amended versions of RESPA prohibit title insurance firms from paying or giving anything of value to other real estate service providers solely in exchange for customer referrals. Pub. L. No. 93-533, § 8, 88 Stat. 1724 (codified as amended at 12 U.S.C. § 2607(a)).

Given the HUD-VA Study's findings that referral agreements were "widely employed," had "replaced

effective price competition," and "resulted in unnecessarily high costs" that often did "not relate to work performed," 1972 House Hearings, at 752, RESPA's ban on referral agreements was a reasonable – and could be expected to be an effective – tool to address the problem of price inflation in the title insurance market. *See* 1972 Senate Hearings, at 73-74 (American Land Title Association "agree[d] with the HUD study that kickbacks or rebates by title insurance companies increase closing costs" and that "[i]f kickbacks were prohibited," that would "bring down the costs").

E. Peat Marwick Study

The referral agreement ban and other RESPA provisions were the subject of a follow up study for which Congress engaged Peat, Marwick, Mitchell and Co.; the firm reported its findings to Congress in 1980. Peat, Marwick, Mitchell & Co., *Real Estate Closing Costs: RESPA, Section 14a* (Oct. 1980) ("Peat Marwick Study"), Vol. I (Executive Summary).

"In order to derive a national perspective on settlement practices and costs," Peat Marwick "collected and analyzed data from a nationally representative sample of 18,000" HUD settlement statements from institutional lenders. *Id.* § II.1. The firm also conducted "a detailed analysis of eight local markets" (Boston, Massachusetts; Denver, Colorado; Washington, D.C.; Jacksonville, Florida; Los Angeles, California; St. Louis, Missouri; San Antonio, Texas;

Seattle, Washington) which included interviewing consumers, service providers and public officials at each site. *Id.* The firm interviewed additional home buyers and sellers at ten other sites; and it conducted over eighty interviews of national, state and local public officials and officers of relevant trade organizations. *Id.*

Peat Marwick analyzed the collected data to "assess[] the effectiveness of RESPA" and "catalogu[e] its various [effects]." *Id.* § III.1. The firm reviewed compliance with key RESPA provisions, "consider[ed] the extent to which certain structures, practices and relationships within the settlement industry" and certain customer behaviors had changed since RESPA was passed, and "investigated whether and to what degree settlement charges ha[d] changed since RESPA's enactment." *Id.*

Among the Peat Marwick Study's findings was the continued "widespread practice" of illegal referral agreements. *Id.* § III.10. Increasingly, the study found, these referral arrangements took the form of "interlocking relationships" between title insurers and other real estate service providers. *Id.*

The Peat Marwick Study also observed that "state regulation of rates" remained "inconsistent," "contributing to or indicative of a lack of workable competition" in the title insurance and conveyancing markets. *Id.* § IV.11.

F. RESPA Amendments

The Peat Marwick Study was among the evidence considered in 1981 Congressional hearings which ultimately led to the passage in 1983 of amendments to RESPA. *See generally*, 1981 House Hearings. Given the study's finding that illegal referral agreements remained widespread, competition continued to be unworkable, and title insurance prices remained inflated, it made sense as a matter of economic policy to continue the general ban on referral agreements. *See* Peat Marwick Study, Vol. I, § III.10 (kickbacks remained widespread). Congress did so. *See* 12 U.S.C. § 2607(a) (kickbacks banned).

G. Subsequent Studies

Since 1983, a number of government sponsored economic studies of the title insurance industry have concluded that while compliance with RESPA has ameliorated some of the problems identified in the earlier Congressional studies, banned customer referral agreements continue to be common. A study by the Government Accountability Office found that "[f]rom 2003 to 2006, insurance regulators in three of [the study's] six sample states had concluded at least 20 investigations related to the alleged payment of referral fees, involving over 52 entities." Report to the Ranking Member, H.R. Comm. on Financial Services: *Title Insurance: Actions Need to Improve Oversight of the Title Industry and Better Protect Consumers*, at 27-28 (Apr. 2007) ("GAO Study") (other three sample

states had no closed cases or settlements). Further, "[s]everal insurance regulators outside of [the] sample states" "expressed concern over activities related to referral fees." *Id.* at 28 (Washington State regulators for example, reported banned relationships "appeared to be 'widespread and pervasive'") (*quoting* Wash. State Office of the Ins. Comm., *An Investigation into the Use of Incentives and Inducements by Title Insurance Companies* (Olympia, Wash., Oct. 2006)). Enforcement of RESPA's anti-kickback provisions was, the GAO found, "uneven." *See* GAO Study, at 46; *id.* at 41 ("until recently," regulators "had taken few actions" against alleged violations of anti-kickback laws).

The California Study, *supra*, similarly found that "[d]espite the federal and state prohibitions and the existence of legal methods of rewarding producers of title insurance business, incidents of known illegal kickbacks to producers of title insurance referrals are common." California Study, at 43; *see id.* at 43-53 (describing investigations and settlements, and citing list of federal RESPA enforcement action settlements from 1997 to December, 2005). Regulators in other states also expressed concerns about the continued use of banned referral agreements. GAO Study, at 27-29 (*citing* 2005 and 2006 reports from regulators in Washington, Illinois and Alaska); California Study, at 34-35 (*citing* 1986 report from Texas Department of Insurance expressing concern about referral fees and

other expenditures that "negatively affect the purchaser of title insurance").

The GAO Study observed that "title industry officials and regulators" disagreed about "the actual extent of price competition within title insurance markets," and about the effect of affiliated business arrangements on the title insurance industry. GAO Study, at 21 (*citing* title industry studies). But the government and industry studies did not question the policy reasons underlying RESPA's anti-kickback provisions; nor was there any dispute that such kickback agreements harm consumers. *See id.* at 54 (recommending that more be done to detect and deter illegal practices in title insurance industry).

From *amici*'s economic perspective, the findings that banned referral agreements remain widespread do not show that RESPA's ban on those relationships is ineffectual; rather, they reflect the fact that the ban is not being adequately enforced by federal and state authorities. Indeed, these findings seem to *amici* to underscore the utility of suits by private consumers to address violations of the RESPA anti-kickback provisions.

Enforcing existing laws and regulations is, of course, but one means of increasing competition and protecting consumer welfare: encouraging use of the Internet to circulate information, considering payments to consumers – instead of other service providers – in exchange for referring business, and other innovations could do a great deal to enhance competition in

the title insurance market. *Cf.* Hahn, Litan and Gurman, *supra*, n. 1. But encouraging innovation must be in addition to, not instead of, enforcing laws prohibiting anticompetitive practices like the banned referral relationships.

When anti-kickback laws are not obeyed, consumers pay prices above those that would occur in a competitive market; inflated prices include not just legitimate costs of providing title services, but also illegitimate costs of illegal referral agreements.

II. IF, AS SHE CLAIMS, RESPONDENT PURCHASED TITLE INSURANCE ENCUMBERED BY A BANNED CUSTOMER REFERRAL AGREEMENT, THEN SHE SUFFERED A DIRECT ECONOMIC INJURY

In September, 2006, Tower City provided real estate settlement services in connection with Respondent's purchase of her home in Cleveland. Joint Appendix (J.A.) 88-90; Petitioners' Appendix (Pet. App.) 53a-54a, 57a. The title insurance policy was issued by Petitioner First American, which was party to an agreement which, among other things, "required [Tower City] to refer title policies 'exclusively'" to First American. J.A. 132. There were exceptions to the exclusivity provision, but in practice "virtually all" of Tower City's title insurance business went to First American. *Id.* at 72; Pet. App. 53a.

In June, 2007, Respondent sued Petitioners, claiming among other things that she paid $455.43

for title insurance issued by First American pursuant to an exclusive referral agreement between First American and Tower City. Pet. App. 48a-60a. She claims that in exchange for her payment, she received a title insurance policy that was issued under an agreement that violated RESPA. *Id.* at 53a-54a.

If, as she claims, Respondent purchased title insurance encumbered by a referral agreement banned under RESPA, then she – like any other consumer who purchased a policy affected by the agreement – paid an inflated price which included not just legitimate costs of providing title services, but illegitimate costs of the banned anticompetitive referral agreement. For the very reasons that Petitioner First American's agreement with Tower City is banned by RESPA, (referral agreements inflate title insurance prices above those that would occur in a competitive market and harm consumers), Respondent's purchase of a policy encumbered by that agreement constitutes a direct and concrete economic injury.

CONCLUSION

Amici do not opine on Respondent's standing as a matter of law. *Amici* do not address what is the best approach to stopping anticompetitive behavior in the title insurance market. *Amici* do opine that as a matter of economics, Respondent's claim that she purchased a title insurance policy encumbered by First

American and Tower City's banned, anticompetitive referral agreement is one of direct, concrete economic injury.

Respectfully submitted,

SHELLEY R. SADIN
ZELDES, NEEDLE & COOPER
A PROFESSIONAL CORPORATION
1000 Lafayette Boulevard
Bridgeport, Connecticut 06604
Tel: (203) 333-9441
Fax: (203) 333-1489
E-Mail: ssadin@znclaw.com

Counsel of Record for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 18 2011
OFFICE OF THE CLERK

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL.,
Petitioners,

v.

DENISE P. EDWARDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ERICK AND WHITNEY CARTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JOHN T. MURRAY
Counsel of Record
MURRAY & MURRAY CO., L.P.A.
111 EAST SHORELINE DRIVE
SANDUSKY, OH 44870
419.624.3000
jotm@murrayandmurray.com

Counsel for Amici Curiae, Erick and Whitney Carter

October 18, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PETITIONERS' ARGUMENT RELIES UPON AN OUTCOME-BASED INTERPRETATION OF RESPA 5

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH RESPA'S PLAIN LANGUAGE AND LEGISLATIVE HISTORY 9

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT OF STANDING 12

IV. ADOPTING PETITIONERS' POSITION WOULD GUT RESPA OF ITS PURPOSE ... 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Alston v. Countywide Fin. Corp.,
585 F.3d 753 (3rd Cir. 2009) . . . . . *passim*

Baker v. G.C. Servs. Corp.,
677 F.2d 775 (9th Cir. 1982) 15

Beaudry v. Telecheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 15, 16

Boulware v. Crossland Mortgage Corp.,
291 F.3d 261 (4th Cir. 2002) 18

Contawe v. Crescent Heights of America, Inc.,
U.S. Dist. LEXIS 20344 (E.D. Pa. 2004) 8

Durr v. Intercounty Title Co. of Ill.,
826 F. Supp. 259 (N.D. Ill. 1993) . . . 5, 6, 7, 8, 14

Edwards v. Your Credit, Inc.,
148 F.3d 427 (5th Cir. 1998) 16

Edwards v. First Am. Title Ins. Co.,
610 F.3d 514 (9th Cir. 2010) 3, 4, 9, 11, 12

Erick C. Carter, et al. v. Welles-Bowen, Inc., et al.,
553 F.3d 979 (6th Cir. 2009) . . . . . *passim*

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 14

Kahrer v. Ameriquest Mortgage Co.,
418 F. Supp.2d 748 (W.D. Pa. 2005) . . . . . *passim*

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 13

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 2, 12, 16, 17

Mercado v. Calumet Fed. Sav. & Loan Ass'n,
763 F.2d 269 (7th Cir. 1985) 18

Moore v. Radian Group, Inc.,
233 F. Supp.2d 819 (E.D. Tex. 2002) .. 8, 10, 14

Morales v. Attorneys' Title Ins. Fund, Inc.,
983 F. Supp. 1418 (S.D. Fla. 1997) . 7, 8, 9, 10, 14

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006) 15

Patton v. Triad Guar. Ins. Corp.,
No. CV100-132 (S.D. Ga. October 10, 2002) ... 3

Pettrey v. Enterprise Title Agency, Inc.,
241 F.R.D. 268 (N.D. Ohio 2006) 10

Purtle v. Eldridge Auto Sales, Inc.,
91 F.3d 797 (6th Cir. 1996) 16

Robey v. Shapiro, Marianos & Cejda, L.L.C.,
434 F.3d 1208 (10th Cir. 2006) 14

Robinson v. Fountainhead Title Group, Corp.,
447 F. Supp.2d 478 (D. Md. 2006) 10

Sierra Club v. Morton,
405 U.S. 727 (1972) 13

Story Parchment Co. v. Paterson Parchment Paper Co.,
282 U.S. 555 (1931) 3

Summers v. Earth Island Inst.,
129 S. Ct. 1142 (2009) 16

United States v. Trenton Potteries Co.,
273 U.S. 392 (1927) 3

Warth v. Seldin,
422 U.S. 490 (1975) 3

Wegoland Ltd. v. NYNEX Corp.,
27 F.3d 17 (2nd Cir. 1994) 19

CONSTITUTION

U.S. Const. art III ..... *passim*

STATUTES

Real Estate Settlement Procedures Act ("RESPA")
12 U.S.C. § 2601, *et seq.* ..... *passim*
12 U.S.C. § 2601(a) 17
12 U.S.C. § 2601(b) 18
12 U.S.C. § 2607 ..... 4, 9, 12, 13
12 U.S.C. § 2607(a) 1
12 U.S.C. § 2607(b) 1, 6
12 U.S.C. § 2607(d)(2) 6, 7, 9, 10
12 U.S.C. § 2608(b) 7
Real Estate Settlement Procedures Act of 1974, Pub.L. No. 93-533, §8(D)(2), 88 Stat. 1724 (1974) 11

Truth in Lending Act ("TILA")
15 U.S.C. § 1601-1667f 14

Fair Credit Reporting Act ("FCRA")
15 U.S.C. § 1681, *et seq.* 15

Fair Debt Collection Practices Act ("FDCPA")
15 U.S.C. § 1692-1692p 14
15 U.S.C. § 1692k(a)(1) 13
15 U.S.C. § 1692k(2)(A) 14

Ohio Rev. Code § 3935.04(A) 18

Ohio Rev. Code § 3935.04(B) 19

Ohio Rev. Code § 3935.04(H) 18

Ohio Rev. Code § 3935.6 19

S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546 ..... 8, 10

RULES

Fed. R. Civ. P. 12(b)(1) 1

Fed. R. Civ. P. 12(b)(1) 1

REGULATIONS

24 C.F.R. § 3500.14(g)(2) 7, 8, 10

INTEREST OF THE AMICI CURIAE[1]

Amici curiae, Erick and Whitney Carter, are plaintiffs in the case entitled ***Erick C. Carter, et al. v. Welles-Bowen, Inc., et al.***, in the Northern District of Ohio, Case No. 3:05 CV 7427. The Carters have alleged violations of the Real Estate Settlement Procedures Act's, 12 U.S.C. § 2601, *et seq.* ("RESPA"), anti-kickback and fee-splitting provisions, 12 U.S.C. § 2607(a) and (b).

The Carters filed their complaint in 2005 alleging that the defendants set up a sham affiliated business arrangement (ABA) for the sole purpose of providing illegal kickbacks in exchange for the referral of real estate settlement work. The defendants filed a motion to dismiss, pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), arguing that the court lacked subject matter jurisdiction because the Carters suffered no injury-in-fact and thus had no standing. On May 31, 2007, the district court entered an order granting defendants' motion to dismiss all of the Carters' claims for lack of subject matter jurisdiction. At the core of the district court's decision was the conclusion that the Carters lacked standing because they did not allege an "overcharge" for settlement services provided.

The Carters appealed that judgment to the Sixth Circuit Court of Appeals which reversed the district

---

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

court's judgment holding that the Carters did, in fact, have Article III standing to bring their claims because they were the recipients of "referrals sullied by kickbacks in violation of RESPA." The Sixth Circuit went on to state that "[t]he plain meaning of the statutory language and the persuasive authorities examined by the court indicate that Congress created a private right of action to impose damages where kickbacks and unearned fees have occurred – even where there is no overcharge." The Sixth Circuit's opinion is reported at 553 F.3d 979.

This case threatens to overrule the Sixth Circuit's holding regarding whether a private purchaser of real estate settlement services has standing under RESPA to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If overruled, title insurers in certain states, including Ohio, will have carte blanche to pay kickbacks and referral fees, completely gutting RESPA of its intended purpose.

SUMMARY OF ARGUMENT

Consumer protection statutes, such as RESPA, "are designed to remedy and prevent harm arising from practices that injure many people but are not, in most instances, sufficiently damaging to outweigh the cost of litigation." *Kahrer v. Ameriquest Mortgage Co.*, 418

F. Supp.2d 748, 756 (W.D. Pa. 2005) (quoting *Patton v. Triad Guar. Ins. Corp.*, No. CV100-132 (S.D. Ga. October 10, 2002)). These statutes often provide a private right of action and seek to encourage litigation by allowing for "statutory damages" which "relieve litigants of the burden of having to prove an exact measure of pecuniary harm arising from a violation of their rights under the statute." *Id.*

Such remedies are particularly important in cases involving anti-competitive behavior because the effect or consequences of that behavior may be difficult to prove. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-400 (1927); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-64 (1931). RESPA is aimed at eliminating anti-competitive behavior: "[t]he purpose of [RESPA] is to prevent certain practices that are harmful to all consumers by establishing that consumers have a right not be subject to those practices...." *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988 (6th Cir. 2009) (quoting *Kahrer*, 418 F. Supp.2d at 756 (internal quotation marks and citation omitted)).

In this case, the Ninth Circuit held that a plaintiff bringing a private cause of action for a RESPA violation need not allege an overcharge to satisfy the Article III requirement of standing. *Edwards v. First Am. Title Ins. Co.*, 610 F.3d 514, 518 (9th Cir. 2010). Quoting this Court's decision in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), the Ninth Circuit recognized that "[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Edwards*, 610 F.3d at 517. RESPA "creates an individual right to receive [settlement services] untainted by kickbacks or fee-

splitting [or referral fees]." *Carter*, 553 F.3d at 989. Here, because Edwards has pleaded that she received settlement services "sullied by [referral fees] in violation of RESPA," she has Article III standing to bring her claims. *Id.*

Petitioners have challenged the Ninth Circuit's decision claiming that Edwards failed to allege an injury-in-fact sufficient to satisfy Article III's standing requirement. They base their argument upon the flawed reasoning contained in a line of cases that has been rejected by numerous courts. Reversing the decision of the Ninth Circuit and adopting that flawed reasoning would require this Court to completely ignore RESPA's plain language and Congress's intent in enacting the statute.

ARGUMENT

Petitioners argue that, when bringing an action for a violation of § 2607 of RESPA, a plaintiff cannot adequately allege an injury-in-fact sufficient to establish Article III standing without alleging that he or she has been "overcharged" for the settlement services provided or has suffered some form of informational injury. Brief for Petitioners (hereinafter "Pet. Br."), at pp. 14-15. Petitioners' position relies upon an outcome-based approach to interpreting RESPA. Courts invoking that approach refuse to recognize that a private litigant may, when authorized to do so, bring an action for statutory damages only.

Here, the Ninth Circuit rejected that outcome-based approach, aligning itself with two other circuit courts to have considered the argument presented by petitioners. *Edwards*, 610 F.3d at 518; *accord Carter*,

553 F.3d 979; *Alston v. Countywide Fin. Corp.*, 585 F.3d 753 (3rd Cir. 2009). Requiring a plaintiff bringing a private cause of action for a violation of RESPA to allege an "overcharge" to have Article III standing would be inconsistent with both the unambiguous statutory language and Congress's intent in enacting RESPA, i.e., the elimination of kickbacks and referral fees. This Court should affirm the judgment of the Ninth Circuit because its holding is consistent with: (1) RESPA's plain language; (2) the legislative history of RESPA; and, (3) the standing requirement of Article III. Additionally, this Court must reject the position suggested by Petitioners because it would completely gut RESPA of its codified purpose.

I. PETITIONERS' ARGUMENT RELIES UPON AN OUTCOME-BASED INTERPRETATION OF RESPA.

The "overcharge" theory offered by Petitioners ignores the plain, unambiguous statutory language and the legislative history of RESPA. It is the product of courts that seek to prevent plaintiffs with otherwise concrete, palpable injuries from seeking redress in federal courts simply because they seek only statutory damages. Examining the line of cases used to support the "overcharge" theory demonstrates that it is based upon flawed reasoning.

A. The genesis of the "overcharge" theory propounded by Petitioners lies within the district court's opinion in *Durr v. Intercounty Title Co. of Ill.*, 826 F. Supp. 259 (N.D. Ill. 1993). The plaintiff in that case brought a putative class action against the defendant for alleged RESPA violations including

"overcharging real estate sellers and buyers for settlement services...." *Id.* at 260. In determining the measure of damages, the court was content with concluding, without discussion, that the plaintiff's damages were equal to three times the amount by which the plaintiff was overcharged. *Id.*

The plaintiff alleged that the defendant charged him $25 to record the deed and $37 to record the mortgage when, in fact, the true recording costs were $23 for the deed and $31.50 for the mortgage. *Durr*, 826 F. Supp. at 259. The plaintiff, however, mistakenly sought three times "the *entire* amount that was billed to [the plaintiff] by [the defendant] for *all* of its services and outlays," even those that were never alleged to have been improper in any way. *Id.* at 260. Incensed by this "greed and obduracy," the district court was eager to dismiss the plaintiff's RESPA claim and to impose sanctions upon plaintiff's counsel. *Id.* at 261. In its haste, the district completely ignored the plain language of RESPA's damages provision. *Id.* Instead, the court blithely concluded that because the plaintiff was overcharged by $7.50, the plaintiff's damages were, at most, equal to three times that amount, totaling $22.50. *Id.*

Had the court examined the language of RESPA's damages provision, 12 U.S.C. § 2607(d)(2), as it was required to do, it would have concluded that the proper measure of damages was three times the amount of charges paid for the settlement services "involved in the violation." 12 U.S.C. § 2607(b). The plaintiff was charged $25 to record the deed and $37 to record the mortgage totaling $62. *Durr*, 826 F. Supp. at 259. So the proper measure of plaintiff's damages was $186.

B. Latching onto the *Durr* court's approach to damages under § 2607(d)(2), the district court in *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997), also blatantly ignored the plain language of RESPA that speaks to the calculation of damages. *See id.* at 1427. Instead, the *Morales* court, in an effort to construct a façade of legitimacy for its outcome-based approach, emphasized the language that describes who may recover damages under § 2607(d)(2): "the 'person charged for the settlement service involved in the violation.'" *Id.* (quoting 12 U.S.C. § 2607(d)(2)). Based upon that language, the court concluded that a "better reading of the statute is that the damage award consist of three times the amount which violates RESPA." *Id.* That conclusion is a non-sequitur as the language quoted by the court is wholly irrelevant to the calculation of damages; rather, it speaks to the person to whom liability is owed. *See Kahrer*, 418 F. Supp.2d at 753.

Nor does the *Morales* court's resort to the language in § 2608(b) legitimize its reasoning. The court reasoned that because Congress used the word "all" to modify the word "charges" in § 2608(b), which governs a seller's liability, its use of the word "any" to modify the word "charges" in § 2607(d)(2) renders "obvious" the conclusion that Congress intended the measure of damages in § 2607(d)(2) to be equal to three times the amount of the "overcharge." *Morales*, 983 F. Supp. at 1427. However, Congress's use of the word "any" "is more indicative of an intent to include all charges rather than merely the portion that constitutes the overpayment." *Kahrer*, 418 F. Supp.2d at 753. Indeed, if Congress intended for damages to be based upon the amount by which a plaintiff was overcharged, it "could

have stated that trebled damages pertained only to the overcharged portion of the fee...." *Id.*

The *Morales* court then sought to support its "overcharge" theory by looking to RESPA's legislative history. *Morales*, 983 F. Supp. at 1427-28. The court, however, mistakenly examined the history of RESPA as it was originally enacted in 1974, which determined damages based upon the amount of the *proscribed payment*. *Id.* (quoting S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546, 6552). If the *Morales* court had considered RESPA's legislative history after it was amended in 1983, the court would have observed that Congress removed the "proscribed payment" language and replaced it with the phrase "any charge paid for such settlement services," which changed the focus of the damages calculation to the amount paid by the buyer rather than the amount of the proscribed payment. *Kahrer*, 418 F. Supp.2d at 753-54. Accordingly, "it is simply nonsensical to suggest that Congress still intended to provide for damages in an amount three times the proscribed payment when it eliminated that very language from the statute." *Id.* at 754.

Nevertheless, other district courts have relied upon the flawed reasoning of the *Morales* and *Durr* courts to conclude that plaintiffs claiming a RESPA violation must allege an "overcharge" to have standing under Article III. *See, e.g., Moore v. Radian Group, Inc.*, 233 F. Supp.2d 819 (E.D. Tex. 2002); *see also Contawe v. Crescent Heights of America, Inc.*, U.S. Dist. LEXIS 20344 (E.D. Pa. 2004).

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH RESPA'S PLAIN LANGUAGE AND LEGISLATIVE HISTORY.

The plain language of RESPA does not, and has never, required a plaintiff to allege an "overcharge."

A. Currently, RESPA's damages provision provides that any person who violates 12 U.S.C. § 2607 is liable to the person "charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). The term "such settlement service" refers to "the settlement service involved in the violation." A plaintiff's damages are, therefore, equal to three times the amount paid "for the settlement service involved in the violation...." Here, the alleged RESPA violation is a referral fee paid by First American to Tower City. *Edwards*, 610 F.3d at 516. Therefore, the settlement services "involved in the violation" include all settlement services provided by First American Title to individuals who were referred to it by Tower City.

As the Ninth Circuit recognized, "the term 'overcharge' does not exist in anywhere within the text of the statute," so there is simply no requirement that Edwards allege that she was "overcharged" for any of those settlement services. *Id.* at 517; *accord Alston*, 585 F.3d at 759 ("The plain language of RESPA section 8 does not require plaintiffs to allege an overcharge."). Even the *Morales* decision, upon which Petitioners' argument relies, concedes that under a literal approach to this language, "recovery under RESPA would be three times the *full amount* of a settlement

charge, regardless of the nature or extent of the alleged RESPA violation." *Morales*, 983 F. Supp. at 1427 (emphasis added). Indeed, this reasoning was adopted by the court in *Kahrer*: "the literal language of § 2607(d)(2) provides for three times the amount of *any charge* paid for settlement services which would appear to encompass *all* of the charges associated with the services provided rather than only treble the amount of any overpayment." *Kahrer*, 418 F. Supp.2d at 753 (second emphasis added); *accord Robinson v. Fountainhead Title Group, Corp.*, 447 F. Supp.2d 478, 489 (D. Md. 2006); *Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268, 277 (N.D. Ohio 2006).

B. As its legislative history makes clear, RESPA has *never* required plaintiffs to allege an "overcharge" in order to maintain a private cause of action. Courts espousing the "overcharge" theory have invoked the legislative history of RESPA, as it was enacted in 1974, for support. *See, e.g., Morales*, 983 F. Supp. at 1427-28; *see also Moore*, 233 F. Supp.2d at 825-26. Those courts cite to the Senate Report explaining that, at that time, the treble damages provision of § 2607(d)(2) provided: "any person or persons who violate the provisions of the section shall be liable to the person whose business has been referred for three times the amounts of the proscribed payment, kickback or referral fee." *Moore*, 233 F. Supp.2d at 825-26 (quoting S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546, 6552).

Yet, even that language does not require an "overcharge." The actual language of the statute prior to the 1983 amendment provided that:

> [A]ny person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services in an amount equal to three times the amount of the portion, split, or percentage.

Kahrer, 418 F. Supp.2d at 753-54 (quoting the Real Estate Settlement Procedures Act of 1974, Pub.L. No. 93-533, §8(D)(2), 88 Stat. 1724 (1974)).

This language, which is no longer controlling, does not refer to an "overcharge." Instead, as stated above, it merely provided for a different basis upon which to calculate the amount of damages. Here, the alleged RESPA violation is a referral fee paid by First American to Tower City. *Edwards*, 610 F.3d at 516. Edwards's business was referred by Tower City to First American. *Id.* Therefore, even under the pre-1983 version of the statute, both entities would be liable to Edwards in an amount equal to three times the referral fee paid by First American. This interpretation is supported by the implementing regulations promulgated by the U.S. Department of Housing and Urban Development ("HUD") interpreting the term "thing of value." *Kahrer*, 418 F. Supp.2d at 755 n.9. The regulations provide: "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining

whether the act is prohibited." *Id.* (quoting 24 C.F.R. § 3500.14(g)(2)).

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT OF STANDING.

Article III, Section 2 of the Constitution requires a private plaintiff to demonstrate standing to sue consisting of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and, (3) the likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Petitioners argue that, without alleging an "overcharge," Edwards cannot demonstrate an injury-in-fact.

The injury-in-fact element of standing requires a plaintiff to demonstrate the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted). Here, the Ninth Circuit concluded that a plaintiff bringing an action for a violation of § 2607 has standing under Article III regardless of whether he or she has been overcharged for the settlement services provided. *Edwards*, 610 F.3d at 516-17. That decision brought the Ninth Circuit into agreement with both the Sixth Circuit and Third Circuit. *Id.* at 518 (citing *Carter*, 553 F.3d at 989; *Alston*, 585 F.3d at 755). As explained in those two opinions, a plaintiff claiming a RESPA violation need not allege an "overcharge" to establish an injury in fact sufficient to confer Article III standing.

A. *Amici*, the Carters, previously sought review of this same issue in the Sixth Circuit where the court determined that they had Article III standing despite not alleging an "overcharge." *Carter*, 553 F.3d at 988-89. The appellees in that case relied upon the same argument as that propounded by Petitioners here, i.e., that a plaintiff who does not allege an "overcharge" lacks standing to sue under § 2607. *Id.* at 984.

In analyzing the requirement of Article III standing, the Sixth Circuit recognized that "Congress no doubt has the power to create new legal rights, and it generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right." *Id.* at 988 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). The court also recognized two limitations upon that power. First, it recognized that such authority is not unlimited because "Congress may confer standing to redress injuries only on parties who actually have been deprived of the newly established statutory rights." *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). Second, the court stated that even though the "injury need not be economic in nature, it still must cause individual, rather than collective, harm." *Id.* at 989 (citing *Morton*, 405 U.S. at 738).

Continuing its analysis, the Sixth Circuit stated that RESPA (1) "creates an individual right to receive referral services untainted by kickbacks or fee-splitting" and, (2) "authorizes suits only by individuals who receive a loan that is accompanied by an unlawful referral, which is plainly an individualized injury." *Id.* Because the Carters had "pleaded that they themselves were given referrals sullied by kickbacks in violation of RESPA," the court determined that

"they ha[d] Article III standing to bring these claims." *Id.*

The Sixth Circuit analogized its holding to this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), stating "[j]ust as a violation of the rights of 'testers' to receive 'truthful information' supports standing, so does a violation of the right to receive referrals untainted by conflicts of interest." *Id.* (quoting *Havens Realty*, 455 U.S. at 373-74). Finally, the court made explicit its rejection of the *Moore*, *Morales*, and *Durr* line of cases when it stated that the reasoning used by those courts "overlooks the Supreme Court's teaching that injuries need not be financial in nature to be concrete and individualized." *Id.* (internal citations omitted).

B. The Third Circuit also decided this same issue in *Alston*, 585 F.3d 753, where it reversed the order of the district court and concluded that RESPA Section 8 does not require an overcharge allegation. *Id.* at 755. In determining whether the plaintiffs had Article III standing, the court relied heavily upon the Sixth Circuit's decision in *Carter*, but also noted the comparison of RESPA to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. *Id.* at 763 n.12. The FDCPA authorizes both actual and statutory damages where a debt collector fails to comply with the statute. *Id.* (citing 15 U.S.C. § 1692k(a)(1), (2)(A)). The Third Circuit noted decisions from the Tenth and Ninth Circuits holding that a plaintiff may suffer a cognizable statutory injury based wholly on the invasion of the legal right to fair debt collection treatment, regardless of whether it had a collectable debt. *Id.* (citing *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208 (10th Cir.

2006); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982)). Based upon those decisions, the Third Circuit concluded that "[s]imilarly, the provision of statutory treble damages in RESPA, based on the total charges paid for the settlement services at issue, obviates an actual damages requirement." *Id.* at 763 n.12.

The FDCPA is just one of many analogous consumer protection statutes. In 2009, the Sixth Circuit held that the Fair Credit Reporting Act's, 15 U.S.C. § 1681, *et seq.* ("FCRA"), "private right of action does not require proof of actual damages as a prerequisite to the recovery of statutory damages...." *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 703 (6th Cir. 2009). In that case, the district court dismissed the plaintiff's complaint, which sought statutory damages, on the basis that she had not alleged any injury. *Id.* The Sixth Circuit examined a host of case law interpreting FCRA and other consumer protection statutes and specifically concluded that "[n]o Article III (or prudential) standing problem arises" because "Congress 'has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right....'" *Id.* at 707 (quoting *Carter*, 553 F.3d at 988). That conclusion was consistent with the Seventh Circuit's holding, regarding the same issue, that "[a plaintiff] could seek statutory damages 'without proof of injury' in lieu of actual damages." *Beaudry*, 579 F.3d at 706 (quoting *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006)).

In *Beaudry*, the Sixth Circuit also cited one of its previous decisions in which it reached the same conclusion regarding the Truth in Lending Act

("TILA"), 15 U.S.C. § 1601-1667f. *Beaudry*, 579 F.3d at 706 (citing *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996)). The court in *Purtle* held that "a consumer did not need to show that she 'suffered actual monetary damages' or that she 'was actually misled or deceived' in order to prevail on a TILA claim for statutory damages and attorney fees." *Id.* The Sixth Circuit recognized that the same conclusion was reached by the Fifth Circuit in 1998. *Beaudry*, 579 F.3d at 706 (citing *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 441 (5th Cir. 1998)).

The Ninth Circuit's decision in this case is, therefore, supported by a long line of case law interpreting RESPA and other consumer protection statutes. Petitioners' arguments to the contrary are insufficient to rebut these courts' well-reasoned conclusions in all of those cases.

C. In challenging the decision of the Ninth Circuit, Petitioners attempt to dismiss the determination that Edwards has standing based upon the invasion of her right to receive settlement services free of the taint of prohibited kickbacks and referral fees. Pet. Br. at p. 39. Petitioners classify such a right as "abstract, self-contained, and noninstrumental" claiming that "Congress cannot legislate away Article III's requirement of particular and concrete injury by purporting to convey such a right." Pet. Br., at p. 39 (quoting *Lujan*, 504 U.S. at 573; *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009)).

The Sixth Circuit, however, specifically addressed this concern and concluded that the right to receive settlement services untainted by kickbacks or fee-splitting fits within the limitation that Congress may

empower individuals to sue based only on "personal and individual[ized] injuries." *Carter*, 553 F.3d at 989 (quoting *Lujan*, 504 U.S. at 560 n.1). The court concluded that RESPA "does not authorize suits by members of the public at large; it authorizes suits only by individuals who receive a loan that is accompanied by an unlawful referral, *which is plainly an individualized injury*." *Carter*, 553 F.3d at 989 (emphasis added).

IV. ADOPTING PETITIONERS' POSITION WOULD GUT RESPA OF ITS PURPOSE.

This Court should reject Petitioners' position because it misstates the purpose of RESPA and would grant title insurers in certain states, including Ohio, carte blanche to pay kickbacks, gutting RESPA of its actual purpose.

A. Petitioners claim that "Congress enacted RESPA to protect 'consumers throughout the Nation ... from *unnecessarily high settlement charges* caused by certain abusive practices.'" Pet. Br., at p. 40 (quoting 12 U.S.C. § 2601(a)). Based upon that stated purpose, Petitioners argue that it is "the financial injury caused when a settlement service provider takes advantage of an unwitting customer unlawfully referred" that satisfies the injury requirement of Article III standing. *See* Pet. Br., at p. 41. Applying those purported principles to the facts of this case, Petitioners conclude that Edwards lacks standing because she did not claim that she was overcharged for her title insurance. *See* Pet. Br., at p. 14. Petitioners go further claiming that "[a]ny such allegation would in any event fail because, under the state regulatory regime in place in Ohio, [Edwards] had no lower-priced

insurance option." Pet. Br., at p. 14. Petitioners' argument must be rejected for two reasons.

B. First, this Court must reject Petitioners' position because it misstates the purpose of RESPA. The language quoted by Petitioners states Congress's *findings*, not the purpose of Section 8 of RESPA. In fact, Congress's purpose in enacting RESPA was the "*elimination of kickbacks and referral fees* that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b) (emphasis added). As the Fourth Circuit has noted, Section 8(a) of RESPA "prohibits the payment of formal kickbacks or fees for the referral of business and *does not require an overcharge to a consumer*." *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002) (emphasis added). Indeed, Section 8 of RESPA was not intended to eliminate all settlement service overcharges: "Congress chose to leave markups and the price of real estate settlement services to the free market by consider[ing] and explicitly reject[ing] a system of price control for fees." *Id.* at 268 (quoting *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985)). Rather, the purpose of RESPA was to prohibit kickbacks and referral fee arrangements. *Boulware*, 291 F.3d at 268.

C. Second, this Court must reject Petitioners' position because it would grant title insurers in certain states, such as Ohio, carte blanche to pay kickbacks and referral fees. The State of Ohio requires all insurers, including title insurers, to file their premium rates with the state superintendent of insurance. OHIO REV. CODE § 3935.04(A). Once that rate is filed, an insurer is prohibited from charging a rate that differs from the filed rate. *Id.* at § 3935.04(H). Furthermore,

Ohio permits its insurers to join state-licensed rating bureaus which file rates for all of their members. *See id.* at §§ 3935.04(B), 3935.06. After the state agency approves the filed rate, the filed rated doctrine bars ratepayers from challenging the reasonableness of the filed rate through judicial proceedings. *See Alston*, 585 F.3d at 763 (citing *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Cir. 1994)).

Armed with the filed rate doctrine and a decision by this Court requiring plaintiffs to allege an "overcharge" to have standing, title insurers in Ohio, and other states with similar insurance laws, would be free to pay kickbacks and referral fees with impunity. Plaintiffs not alleging an "overcharge" would lack standing to sue under RESPA and those that were to allege an "overcharge" would have their claims barred by the filed rate doctrine. Such an absurd result would completely gut the purpose of RESPA.

CONCLUSION

For all of the foregoing reasons, the Carters respectfully request that the decision of the Ninth Circuit be affirmed.

Respectfully Submitted,

October 18, 2011

John T. Murray
Counsel of Record
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
419.624.3000
jotm@murrayandmurray.com

Counsel for Amici Curiae,
Erick and Whitney Carter

AMICUS CURIAE BRIEF

No. 10-708

In The Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, Successor in Interest to The First American Corporation, and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and on Behalf of all Others Similarly Situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS AND FOR REVERSAL OF THE NINTH CIRCUIT'S JUDGMENT

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW, 7th Floor
Washington, DC 20036
(202) 236-6930
afortney@hudco.com

August 29, 2011

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

THE COURT OF APPEALS' DECISION ERRANTLY TRANSFORMS A PLAINTIFF'S "INVOLVEMENT" IN A TRANSACTION INTO "INJURY-IN-FACT" TO FIND ARTICLE III STANDING 4

A. The consumer reporting industry and civil liability for willful violations of the FCRA 9

B. The impact of the court of appeals' decision if applied to the FCRA's statutory damages provision 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Beaudry v. TeleCheck Services, Inc., 579 F.3d 702 (6th Cir. 2009) 13, 14

Edwards v. First Am. Corp., 610 F.3d 514 (9th Cir. 2010) 5, 8

Fulfillment Servs., Inc. v. UPS, 528 F.3d 614 (9th Cir. 2008) 5

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3, 5

Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006) 13

Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007) 12

Sarver v. Experian Info. Solutions, 390 F.3d 969 (7th Cir. 2004) 9

Sierra Club v. Morton, 405 U.S. 727 (1972) 7

Summers v. Earth Island Inst., 555 U.S. 483, 129 S. Ct. 1142 (2009) 3

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 9

Warth v. Seldin, 422 U.S. 490 (1975) 6, 7

Whitmore v. Arkansas, 495 U.S. 149 (1990) 7

CONSTITUTIONAL AUTHORITIES AND STATUTES

U.S. Const. Art. III ..... *passim*

15 U.S.C. § 1681(a)(1) 9

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 1681(a)(2) 9

15 U.S.C. § 1681(b) 14

15 U.S.C. § 1681e(b) 10, 13

15 U.S.C. § 1681i(a) 10

15 U.S.C. § 1681i(a)(1)(A) 13

15 U.S.C. § 1681n 10

15 U.S.C. § 1681o 10, 11

15 U.S.C. § 1681o(a)(1) 11

15 U.S.C. § 1681n(a)(1)(A) 11

15 U.S.C. § 1681n(a)(2) 11

15 U.S.C. § 1681n(a)(3) 11

OTHER AUTHORITIES

140 Cong. Rec. H9797 (Sep. 27, 1994) 12

Black's Law Dictionary (8th ed. 2004) 11

Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) 9, 10

Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003) 9

INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, First American.[2]

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200

---

[1] Petitioners and respondent have filed blanket consent letters with the Court concerning the filing of *amicus* briefs. Therefore, under Rule 37.3(a), all parties have consented to the filing of CDIA's *amicus* brief. The parties' blanket consent letters on are on file with the Clerk of Court.

As required by Rule 37.6, CDIA states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] As used herein, "First American" refers to petitioners, First American Financial Corporation, successor in interest to The First American Corporation and First American Title Insurance Company.

consumer credit and other specialized CRAs operating in the United States and throughout the world.

CDIA is vitally interested in the outcome of this case because the court of appeals' decision misapplies this Court's decisions to conclude that an *uninjured* plaintiff demonstrates Article III standing,[3] and may seek statutory damages, simply by alleging that a defendant violated a statute regulating the defendant's conduct in a transaction that *involved* the plaintiff.

Because CRAs are sued many times each year by uninjured plaintiffs seeking statutory damages for the alleged willful violation of the Fair Credit Reporting Act ("FCRA"), CDIA's members may be directly impacted by the court's decision. The court of appeals' decision could be relied upon by such plaintiffs to avoid Article III standing requirements when bringing claims against CRAs, including putative class actions – to recover between $100 and $1,000 for each violation – under the FCRA's civil liability provision which permits such recovery for willful violations but does not expressly limit its application to only those instances when a plaintiff can allege some injury.

---

[3] U.S. Const. Art. III.

SUMMARY OF ARGUMENT

A statutory provision enacted by Congress that permits the recovery of damages without expressly requiring that a plaintiff allege and prove an actual injury fairly traceable to the alleged violation cannot confer Article III standing upon a plaintiff alleging claims under such a statute. Allowing a plaintiff to bring a claim under such a statute when the plaintiff has not alleged an injury would undermine the requirement that this Court has described as the "irreducible constitutional minimum of standing."[4]

Moreover, such a decision could be used by plaintiffs to avoid the Article III standing requirement when bringing claims under statutes, such as the FCRA, that permit the recovery of up to $1,000 for each alleged willful violation without expressly requiring an actual injury. To prevent such an outcome, this Court should reverse the court of appeals' decision to make clear that actual injury remains part of the "hard floor of Article III jurisdiction that cannot be removed by statute[s],"[5] such as RESPA or the FCRA, which do not expressly require "injury" in order to recover statutory damages.

---

[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[5] *Summers v. Earth Island Inst.*, 555 U.S. 483, 129 S. Ct. 1142, 1151 (2009).

ARGUMENT

CDIA agrees with First American that the court of appeals' failed to correctly apply the U.S. Constitution's Article III standing requirement to respondent Denise Edwards' ("Edwards") claim seeking recovery, under RESPA, of three times the amount Edwards paid to Tower City Title Agency LLC ("Tower City") to purchase lender and borrower title insurance policies that Tower City issued on behalf of First American.[6]

Because CDIA has been involved in the consumer reporting industry for more a century, CDIA provides its separate brief to describe the potential impact of the court of appeals' decision beyond its immediate application to an uninjured plaintiffs' ability to recover penalties under the Real Estate Settlement Procedures Act ("RESPA").

THE COURT OF APPEALS' DECISION ERRANTLY TRANSFORMS A PLAINTIFF'S "INVOLVEMENT" IN A TRANSACTION INTO "INJURY-IN-FACT" TO FIND ARTICLE III STANDING.

The court of appeals' decision briefly acknowledges the three minimum requirements a plaintiff

---

[6] First American's brief at 18-42.

must allege to have standing under Article III – "injury, causation, and redressability."[7]

This Court has explained more fully that "the irreducible constitutional minimum of standing contains three elements:"[8]

> First, the plaintiff must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized . . . ; and (b) is actual or imminent, not conjectural or hypothetical. . . .
>
> Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action". . . .
>
> Third, it must be "likely" as opposed to merely "speculative," that the injury will be redressed by a favorable decision. . . .[9]

The court of appeals focused on the first element, whether Edwards alleged an "injury" for Article III purposes.[10] For the court, because "RESPA prohibits the payment of 'any fee, kickback, or thing of value' in exchange for business referrals," Edwards sufficiently alleged an "injury" simply by alleging the fact of the

---

[7] *Edwards v. First Am. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010) (*citing*, *Fulfillment Servs., Inc. v. UPS*, 528 F.3d 614 (9th Cir. 2008)).

[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[9] *Lujan*, 504 U.S. at 560-561.

[10] *Edwards*, 610 F.3d at 516.

violation of the RESPA prohibition in a transaction in which Edwards was "involved" because she paid for the settlement services.[11]

The court of appeals reached its conclusion by misinterpreting this Court's decision in *Warth v. Seldin*. The court observed:

> The injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." [citations omitted][12] Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.[13]

The court, however, did not consider the context for the quoted language. In *Warth*, this Court was referring, for example, to instances in which Congress authorized a public official to perform certain functions and provided for judicial review of those actions.[14] The issue was whether a third-party could

---

[11] *Id.* at 517. Edwards did not allege that the exclusive agency agreements between First American and Tower City caused her to receive lower quality services or to incur any other economic, physical or psychological harm. *Id.* at 516-517; First American's brief at 8.

[12] *Id.* at 517 (*citing, Fulfillment Servs.*, 528 F.3d at 618-619 which quoted *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

[13] *Id.* (*quoting, Warth*, 422 U.S. at 500).

[14] *Warth*, 422 U.S. at 500 (*citing, Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)).

invoke the court's jurisdiction to determine whether the public official performed his functions according to the law.[15] The standing question the Court addressed in *Warth* was what "injury" must be alleged by "persons who claim *injury of a non-economic nature* to interests that are widely shared."[16] The Court concluded that non-economic injuries – but *injuries* nonetheless – could meet the Article III standing requirement.[17] The paragraph quoted by the court of appeals continues in *Warth*:

> Of course, *Art. III's requirement remains*: the plaintiff must still allege *a distinct and palpable injury to himself*, even if it is an injury shared by a large class of other possible litigants. . . .[18]

This Court has explained that a plaintiff's injury-in-fact must be concrete in both a qualitative and temporal sense."[19] "Abstract" or "hypothetical" injuries will not suffice.[20]

Because Edwards had not alleged an economic injury, the court of appeals searched for a "harm" that

---

[15] *See, e.g., Sierra Club*, 405 U.S. at 732.

[16] *Id.* at 734.

[17] *Id.* (non-economic injuries that will support Article III standing include changes in the aesthetics and ecology of an area).

[18] *Warth*, 422 U.S. at 501 (emphasis added).

[19] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

[20] *Id.*

could meet the "injury-in-fact" standing requirement, concluding that RESPA's referral fee payment prohibition was intended to prevent a non-economic harm: the possibility that the advice of the person providing the referral would be influenced by a financial interest in the recommended service provider.[21]

CDIA does not dispute that RESPA was intended to prevent the non-economic harm identified by the court of appeals. However, the mere *possibility* of such a harm which – in the case before the court of appeals – could not be linked to a "distinct and palpable injury" *to Edwards* herself that was caused by the alleged violation, is merely the sort of abstract and hypothetical injury this Court has rejected as a basis for Article III standing.

The application of the court of appeals' decision to claims alleging that CRAs willfully violated the FCRA, could permit consumers to maintain claims, including putative class action claims, against CRAs – seeking up to $1,000 for each class member – for FCRA violations without even the suggestion that the violation injured any class member. CDIA believes that such claims require that the plaintiff allege and prove some injury to meet the Article III standing requirement.

---

[21] *Edwards*, 610 F.3d at 517-518.

A. The consumer reporting industry and civil liability for willful violations of the FCRA.

Congress recognizes that the consumer reporting industry is vital to the U.S. economy.[22] Each year, CRAs furnish more than 1.5 billion consumer reports to creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[23]

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers.[24] The files contain 2.6 billion tradelines[25] that include billions of items of information the CRAs

---

[22] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

[23] *Id.*; *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003).

[24] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9.

[25] *Id.* at 8-9.

receive from tens of thousands of furnishers on a monthly basis.[26]

Because CRAs produce more than 1.5 billion consumer reports each year, it is not surprising that they are sued hundreds of times each year by consumers alleging violations of the FCRA. Typical lawsuits include claims that the CRAs failed to follow "reasonable procedures" to assure the maximum possible accuracy of the information used to prepare consumer reports concerning the plaintiffs,[27] or that the CRAs failed to conduct reasonable reinvestigations following the receipt of consumer disputes concerning the accuracy or completeness of the information in the CRA's files relating to the plaintiffs.[28] Although such lawsuits arise from less than .0001% of the consumer reports, the costs of defense represent significant expenses for CRAs that must be passed along to their users and ultimately borne by the consumers themselves in the form of higher costs for the users' goods and services.

The FCRA permits consumers to recover for both negligent and willful violations of its requirements.[29] A consumer alleging a negligent violation of the FCRA may recover "*actual damages* sustained by the consumer as a result of the failure" to comply with an

---

[26] *Id.*

[27] 15 U.S.C. § 1681e(b).

[28] 15 U.S.C. § 1681i(a).

[29] 15 U.S.C. §§ 1681n, 1681o.

FCRA requirement.[30] A consumer alleging the willful violation of the FCRA may recover "any actual damages sustained by the consumer as a result of the failure *or damages* of not less than $100 and not more than $1,000."[31] For a consumer alleging a willful violation of the FCRA, the consumer is permitted to elect the measure of "damages" she will recover – *either* "any actual damages" *or* "damages of between $100 and $1,000.[32]

Although the term "damages" is not otherwise defined in the FCRA, its accepted ordinary meaning is: "Money claimed by, or ordered to be paid to, a person as compensation for *loss or injury*."[33] The limited legislative history to the 1996 amendment, which added the $100 to $1,000 alternative measure of damages for a willful violation of the FCRA, did not alter this:

> When [consumer report] information is wrong, *lives can be ruined* . . . we must strengthen consumers' ability to correct false reports as quickly as possible. And when

---

[30] 15 U.S.C. § 1681o(a)(1). Plaintiffs may also recover "the costs of the action together with reasonable attorneys' fees as determined by the court." *Id.* § 1681o(1)(2).

[31] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). In addition to the costs of the action and reasonable attorney's fees, plaintiffs may also recover "punitive damages as the court may allow." *Id.* § 1681n(a)(2)&(3).

[32] 15 U.S.C. § 1681n(a)(1)(A).

[33] Black's Law Dictionary at 416 (8th ed. 2004) (emphasis added).

> such errors are inflicted *willfully or by negligence*, credit bureaus must know that they will be liable.[34]

CDIA believes that a consumer suing a CRA who has elected to forego the recovery of actual damages and to seek statutory damages of up to $1,000 must, to have Article III standing, still allege and prove that *some injury* occurred and that the *injury* was caused by the CRA's alleged violation of the FCRA. The FCRA's statutory damages provision merely permits that consumer to avoid having to prove the *amount* of damages sustained.

B. The impact of the court of appeals' decision if applied to the FCRA's statutory damages provision.

The FCRA governs all aspects of consumer reporting and contains 31 separate sections, 145 subsections, and approximately 34,000 words. In a recent decision involving class action claims for the alleged willful violation of the FCRA, this Court has commented on the dearth of guidance provided to businesses subject to the FCRA and its "less-than-pellucid statutory text."[35]

When preparing consumer reports, CRAs must "follow reasonable procedures to assure the maximum

---

[34] 140 Cong. Rec. H9797 (Sep. 27, 1994) (statement of Mr. Schumer) (emphasis added).

[35] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 (2007).

possible accuracy of the information concerning the individual about whom the report relates."[36] A CRA that receives a consumer dispute must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. . . ."[37] Neither provision expressly requires that a consumer be "injured" as a result of an alleged willful violation in order to recover against a CRA. Some courts have read the absence of such an express "injury" requirement to mean that a plaintiff is not required to allege and prove an injury to have standing and to recover under the FCRA's willful violation provision.[38] CDIA submits that, consistent with Article III's standing requirement, a better reading of the FCRA's statutory damages provision is that consumers must allege and prove an injury caused by the alleged willful violation of the FCRA to have standing, but need not prove the *amount* of damages sustained to recover statutory damages under the FCRA.

---

[36] 15 U.S.C. § 1681e(b) (emphasis added).

[37] 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

[38] *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) ("No Article III . . . standing problem arises, it bears adding, if Beaudry is permitted to file this claim. Congress 'has the power to create new legal rights, [including] right[s] of action, whose injury-in-fact involves the violation of that statutory right. . . ."); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages *without proof of injury*.") (emphasis added).

Under an analysis like that followed by the court of appeals, so long as the consumer is "involved" in the transaction (*e.g.*, if the consumer report is about the consumer), that "involvement" could be sufficient to provide Article III standing even in the absence of actual alleged injury resulting from an alleged violation.

In the case of the FCRA, such a result leads to the contravening Congress' expressed intent for CRAs. Congress' stated purpose for adopting the FCRA was to require that CRAs adopt reasonable procedures for "meeting the needs of commerce for credit, personnel, insurance, and other information."[39] This expressed intent makes clear that the FCRA is not a strict liability statute. Finding that a plaintiff has standing to bring a claim under the FCRA without any allegation of injury would transform the FCRA into such a statute. Such a result would discourage the economic activity the FCRA was intended to foster. Lower courts, without guidance from this Court, have demonstrated that they can and do read the "injury" requirement out of Article III to permit consumers to maintain claims against CRAs alleging willful violations of the FCRA without any allegation of actual injury resulting from such a violation.[40]

Because the court of appeals' erroneous decision, under which a plaintiff's "involvement" may – alone – constitute "injury" for purposes of Article III, could be applied to other laws, such as the FCRA, that permit

---

[39] 15 U.S.C. § 1681(b).

[40] *Beaudry*, 579 F.3d at 707.

the recovery of statutory damages without expressly requiring "injury," the Court should correct the court of appeals' error to make clear that "injury-in-fact," rather than transactional "involvement," remains part of the irreducible minimum a plaintiff must allege and demonstrate in order to have standing.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

ANNE P. FORTNEY
Counsel of Record
JAMES CHAREQ
HUDSON COOK, LLP
1020 19th Street, NW
7th Floor
Washington, DC 20036
(202) 236-6930

August 29, 2010

AMICUS CURIAE BRIEF

BRIEFS

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
535 Griswold,
Suite 2400
Detroit, MI 48226
(313) 983-4801

R. MATTHEW CAIRNS
PRESIDENT OF DRI
Counsel of Record
55 W. Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

Attorneys for Amici Curiae

237838

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* DRI AND ASCDC 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

REQUIRING A LITIGANT TO SHOW ACTUAL INJURY IN ALL LAWSUITS, INCLUDING THOSE ARISING OUT OF STATUTORY CAUSES OF ACTION, IS NECESSARY TO MAINTAIN THE EQUILIBRIUM BETWEEN THE BRANCHES OF GOVERNMENT AND TO LIMIT THE JUDICIAL BRANCH TO DECIDING ONLY REAL, VITAL CONTROVERSIES RATHER THAN NO-HARM LAWSUITS THAT ARE ESSENTIALLY EFFORTS TO SECOND-GUESS EXECUTIVE BRANCH POLICY DECISIONS MADE AS PART OF ITS OBLIGATION TO FAITHFULLY EXECUTE THE LAWS 6

A. Our federal Constitution embodies the idea separate but overlapping branches of government 6

Table of Contents

Page

B. **The standing doctrine is essential to maintaining the equilibrium between the branches of government** 9

C. **Narrowing standing to permit litigants to sue in the absence of actual injury will dramatically increase costly litigation against businesses and individuals** 14

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Wright,
468 U.S. 737 (1984) 4, 5, 9

Bowsher v. Synar,
478 U.S. 714 (1986) 8

Burlington N.R. Co. v. Woods,
480 U.S. 1 (1987) 1

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 10

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10

Edwards v. First American Corp.,
610 F.3d 514 (9th Cir. 2010) 2, 4, 13, 14

Friends of the Earth, Inc. v. Laidlaw Environmental Services,
528 U.S. 167 (2000) 9, 10

Gambardella v. G. Fox & Co.,
716 F.2d 104 (2d Cir. 1983) 15

Hein v. Freedom from Religion Foundation, Inc.,
551 U.S. 587 (2007) 4, 9

Cited Authorities

Page

Lewis v. Casey,
518 U.S. 343 (1996) 5

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9, 10, 11, 12

Mistretta v. U.S.,
488 U.S. 361 (1989) 8

O'Donoghue v. U.S.,
289 U.S. 516 (1933) 3

Owen Equipment & Erection Co. v. Kroger,
437 U.S. 365 (1978) 4

Pisciotta v. Old Nat. Bankcorp,
499 F.3d 629 (7th Cir. 2007) 18

Purtle v. Eldridge Auto Sales, Inc.,
91 F.3d 797 (6th Cir. 1996) 15

Raines v. Byrd,
521 U.S. 811 (1997) 12, 14

Ratner v. Chemical Bank New York Trust Co.,
54 F.R.D. 412 (S.D.N.Y. 1972) 18

Schlesinger v.
Reservists Committee to Stop the War,
418 U.S. 208 (1974) 11

Cited Authorities

Page

Seig v. Yard House Rancho Cucamonga, LLC,
2007 WL 6894503 (C.D. Cal. 2007) 18

Steel Co v. Citizens for a Better Environment,
523 U.S. 83 (1998) 11, 12

Summers v. Earth Island Institute,
129 S. Ct. 1142 (2009) 10

U.S. v. Richardson,
418 U.S. 166 (1974) 11

Wal-Mart Stores, Inc. v. Dukes, et al.,
131 S. Ct. 2541 (2011) 15

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 8

STATUTES

U.S. Const. ..... *passim*

U.S. Const. art. I, § 1 ..... 3, 8

U.S. Const. art. II, § 1 3

U.S. Const. art. II, § 2 ..... 8, 9

U.S. Const. art. III ..... *passim*

U.S. Const. art. III, § 1 8

Cited Authorities

	Page
U.S. Const. art. III, § 2	9
U.S. Const. art. III, § 2, cl. 1	3
12 U.S.C. § 2607	4, 13
12 U.S.C. § 2607(a)	13
12 U.S.C. § 2607(d)(2)	13
12 U.S.C. § 4907	15
15 U.S.C. § 1640	14, 15
15 U.S.C. § 1681n	14
15 U.S.C. § 1681, *et seq.*	15
15 U.S.C. § 1692	15
15 U.S.C. § 1693m(a)(2)	15
29 U.S.C. § 1854	15
47 U.S.C. § 227(3)	14
Sup. Ct. R. 37.6	1

Page

OTHER CITED AUTHORITIES

John H. Beisner, *et al.*, ***Class Action "Cops": Public Servants or Private Entrepreneurs?***, 57 Stan. L. Rev. 1441 (April 2005) 17

Bradley J. Bondi, ***Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation***, 33 Harv. J.L. & Pub. Pol'y 607 (Spring 2010) 16, 17

Robert F. Carangelo, *et al.*, ***Cost-Shifting in Electronic Discovery***, 50 Dec. Fed. Law. 35 (Nov/Dec 2003) 16

Jan Deutsch, ***Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science***, 20 Stan L. R. 169 (1968)..... 14

Nan S. Ellis, ***The Class Action Fairness Act of 2005: The Story Behind the Statute***, 35 J. Legis. 76 (2009)..... 16

Fin. Servs. Forum, 2007 Global Capital Markets Survey 8 (2007) 17

Cited Authorities

Page

Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L. J. 679 (1997).. 14

Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L. J. 1725 (1996) 7

Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002 (1924) 9

George Lawson, *Politica Sacra et Civilis* (London 1660) 7

McKinsey & Co., *Sustaining New York's and the US' Global Financial Services Leadership 101* (2007) 17

C. Montesquieu, *The Spirit of the Laws* 202 (D. Carrithers ed. 1977) (T. Nugent trans. 1st ed. 1750) 7

Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L. J. 449 (1991)..... 7

Montesquieu, *The Spirit of the Laws* 151 (T Nugent trans. 1949) 7-8

Cited Authorities

Page

John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L R 1219 (1993) 9

White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, xiii (May 2010) 16

INTEREST OF *AMICI CURIAE* DRI AND ASCDC[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of approximately 22,00 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership and to the judicial system.

The Association of Southern California Defense Counsel ("ASCDC") is a voluntary membership association of approximately 1,100 attorney members of California's civil defense bar. ASCDC's members, like those of DRI, primarily represent individuals and businesses involved in civil litigation. ASDCD has appeared as *amicus curiae* in numerous cases, including before this Court in *Burlington N.R. Co. v. Woods*, 480 U.S. 1 (1987). ASCDC

---

1. In accordance with Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from *amici curiae*, their members, and their counsel, made a monetary contribution to the brief's preparation or submission. All parties have granted a blanket consent to the filing of this brief and all other *amicus curiae* briefs, through letters on file with the Clerk's office.

is one of over 50 state and local defense organizations that are affiliated with DRI, and has a particular interest in joining DRI in this appeal, which began in litigation in Southern California.

DRI and ASCDC seek to contribute to the Court's consideration of cases in which the experiences of its members may assist the Court in the decision-making process. This is one such case. DRI and ASCDC's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. The Ninth Circuit's decision in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), has a profound effect on businesses and individuals who may be subject to these types of suits as it narrows the doctrine of standing to allow the judiciary to resolve these disputes in the absence of an actual injury. The Ninth Circuit's erroneous disposition, if affirmed, would encourage hosts of unwarranted suits against the individuals and corporations DRI's and ASCDC's members are called upon to defend.

When the federal courts narrow the standing doctrine, they open the floodgates of litigation well beyond the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI and ASCDC.

The Ninth Circuit's decision erodes the equilibrium sought to be achieved through the U.S. Constitution's establishment of three separate branches of government. DRI therefore has a strong interest in assuring that the

rule adopted in this case recognizes Congress's right to create statutory causes of action while safeguarding the balance between the three branches of government and ensuring that no-harm class action suits do not proliferate.

SUMMARY OF THE ARGUMENT

Through the establishment of legislative, executive, and judicial departments of government, the United States Constitution embodies a bedrock separation-of-powers principle that prevents courts from undertaking tasks assigned to the political branches of government. The United States Constitution, Article III vests the judicial power in the courts. In pertinent part, it provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The federal Constitution vests the executive power in the President. U.S. Constitution, Article II, Section 1. And it vests the legislative power in a Congress comprised of a Senate and House of Representatives. U.S. Constitution, Article I, Section 1. This Court has long recognized that the separation of governmental divisions "is not merely a matter of convenience or of governmental mechanism." *O'Donoghue v. U.S.*, 289 U.S. 516, 530 (1933). The constitutional constraints upon the judiciary's powers to render decisions about executive or legislative actions are significant protections in our system of government.

Equally important is the Constitutional limitation of the judiciary's power to resolving only "Cases" or "Controversies." Article III, Section 2, Clause 1. This

provision forms the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by statutory language purportedly entitling any person to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, the Legislature cannot confer standing on any person in the absence of a showing that the person satisfies the constitutional test for standing. That test requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct" that is "likely to be redressed by the requested relief." *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007), quoting *Allen v. Wright, supra*, at 751. This test comports with the longstanding precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co v. Kroger*, 437 U.S. 365, 374 (1978).

In light of these separation-of-powers principles, the Ninth Circuit should have accepted First American's argument that the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, cannot be read to allow suit in the absence of a showing of actual injury because such a construction renders the provision unconstitutional. Plaintiff in this case argued, and the Ninth Circuit agreed, that "[b]ecause "RESPA gives Plaintiff a statutory cause of action," she had standing to pursue her claim against First American, even though Plaintiff was not charged more for title insurance due to the claimed kickback and exclusivity agreement. *Edwards v. First American Corp.*, 610 F.3d 514, 518 (9th Cir. 2010). The Ninth Circuit's decision represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." It contradicts this Court's observation of the constitutional underpinnings to the standing doctrine and the need to be

vigilant to prevent the judiciary from usurping the power assigned to the political branches. *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Allen v. Wright*, *supra*, at 750-752.

The pertinent language in RESPA – "to the person or persons charged for the settlement service involved in the violation" – must be read to incorporate the constitutionally-required "actual injury" showing that is the core component of the standing doctrine. Because the Ninth Circuit erroneously ruled that Plaintiff may proceed with her RESPA lawsuit without any showing of actual injury, this Court should reverse the Ninth Circuit's decision and squarely hold that Plaintiff lacks standing to pursue her and the putative class' RESPA §8(a) claim. Failure to do so will not only provide an additional forum for individuals who have not prevailed in the representative process of government to rehash their grievances, it will also result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. DRI and ASCDC believe that preserving the Legislature's right to create a statutory cause of action while simultaneously requiring a plaintiff to allege actual injury will safeguard the constitutionally-derived balance of powers between and among the three branches of government, by maintaining the longstanding doctrine of standing, which is as an indispensable element of our separation of powers.

ARGUMENT

REQUIRING A LITIGANT TO SHOW ACTUAL INJURY IN ALL LAWSUITS, INCLUDING THOSE ARISING OUT OF STATUTORY CAUSES OF ACTION, IS NECESSARY TO MAINTAIN THE EQUILIBRIUM BETWEEN THE BRANCHES OF GOVERNMENT AND TO LIMIT THE JUDICIAL BRANCH TO DECIDING ONLY REAL, VITAL CONTROVERSIES RATHER THAN NO-HARM LAWSUITS THAT ARE ESSENTIALLY EFFORTS TO SECOND-GUESS EXECUTIVE BRANCH POLICY DECISIONS MADE AS PART OF ITS OBLIGATION TO FAITHFULLY EXECUTE THE LAWS.

A. Our federal Constitution embodies the idea separate but overlapping branches of government.

Political philosopher Baron de Montesquieu provided the classical formulation of separation of powers and liberty in the 18th century:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the

> judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

C. Montesquieu, *The Spirit of the Laws* 202 (D. Carrithers ed. 1977) (T. Nugent trans 1st ed. 1750). Another early thinker, George Lawson, laid the foundation for Locke's Second Treatise on Government, a work that was important to the thinking of this country's founders. See Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L J 449, 459 (1991). Earlier thinkers, such as Montesquieu, had emphasized the importance of dividing judging from the legislative and executive powers. Lawson divided the notion of execution of the laws into "'acts of Judgment'—hearing and decision of cases upon evidence—and 'execution.'" *Id.* quoting George Lawson, *Politica Sacra et Civilis*, at 41-56 (London 1660). This division was later embodied in Locke's theory emphasizing the separation of powers, which proposed a division of power between three branches of government. *Id.* quoting Locke at 350-351.

These separation-of-powers notions were a critical element of the Founders' discussions about the structure of government that was eventually adopted in the United States Constitution. Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725, 1764-1771 (1996). According to Montesquieu, "legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to make peace or war and to establish public security; judicial power entailed punishing criminals and resolving disputes between individuals." Flaherty, citing Montesquieu, *The*

Spirit of the Laws 151 (T Nugent trans 1949). Consistent with this, the United States Constitution establishes three distinct departments of government and grants to each the responsibility for exercising one of the three major types of governmental power. US Const, art I, § 1; art II, § 2; art III, § 1. But this separation of powers was not intended to make each branch completely autonomous or result in a 'hermetic division" of the branches. *Bowsher v. Synar*, 478 U.S. 714, 748-49 (1986); *Mistretta v. U.S.*, 488 U.S. 361, 381 (1989). This idea of separate but overlapping branches was perhaps best articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Because the spheres of action overlap, the branches can check each other's actions. For example, the judiciary reviews executive branch actions and the legislature enacts laws that define and limit executive branch powers within various regulatory spheres, such as in the area of banking, environmental, or real estate transactions. Each branch can therefore serve as a check and balance on the other. The standing doctrine serves to keep this careful calibration of powers in balance.

B. The standing doctrine is essential to maintaining the equilibrium between the branches of government.

This case falls at the heart of these limits on the judiciary's exercise of legislative power and presents the Court with the opportunity to clarify the standing doctrine as it applies to RESPA and the Legislature's right to confer standing on a litigant. Whether a party has a sufficient stake in an otherwise justiciable controversy in order to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Standing is not an ingenious academic exercise in the conceivable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The doctrine assures that the "courts exercise power 'only in the last resort, and as a necessity,' and only when adjudications consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L R 1219, 1223-1224 (1993) quoting *Allen v. Wright*, *supra*, at 752.

Standing, a threshold requirement to any suit, originated from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." art III, § 2; *Hein v. Freedom From Religions Foundation, Inc.*, *supra*, at 598; *Lujan*, *supra*; *Friends of the Earth, Inc v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy

as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra*, at 559-560. See also *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts must therefore satisfy the threshold requirement imposed by Article III by alleging standing. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). That means that a plaintiff must demonstrate a personal stake in the outcome in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. 103 S Ct at 1665. Under such an approach, abstract injury is not enough. *Id.* A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Id.* The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services, supra*, at 180-81.

The requirement of standing serves as a means of resisting judicial intrusion into the operations of the other branches of government. The standing doctrine is a critical and inseparable element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine

of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

The concern present here – that one branch of government can turn an "undifferentiated public interest...into an 'individual right' vindicable in the courts" -- led this Court in *Lujan* to reject citizen standing on the basis of a Congressional grant unless the plaintiff could show actual injury. Similarly, this Court in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), held that standing to sue may not be predicated upon an interest held in common by the public at large but must be predicated upon concrete injury, actual or threatened. The *Schlesinger* court explained that permitting suit in those circumstances would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id.* at 222. According to *Schlesinger*, this flows from our system "of government [which] leaves many crucial decisions to the political processes." *Id.* at 227. The Constitution did not "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts"; it "created a representative Government" with citizens having the "right to assert [their] views in the political forum or at the polls." *US v. Richardson*, 418 U.S. 166, 179 (1974).

Likewise in *Steel Co v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court rejected an organization's efforts to litigate because the organization

"seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA." *Id.* at 106. This was not enough to create standing but merely underscored the separation-of-powers problem raised by such suits. In *Steel Co*, the Court grounded its rejection of citizen-standing on the redressibility requirements. The same separation-of-powers theme can be readily seen, regardless of the prong of the standing doctrine on which the court relies.

Lujan similarly taught that a citizen suit provision cannot confer standing to sue in the absence of the traditional showing. 504 US at 573. According to *Lujan*, if the courts ignore the concrete injury requirement "at the invitation of Congress," they would be ignoring "one of the essential elements ... that are the business of the courts rather than of the political branches." *Id.* at 576. Standing cannot be satisfied by a "congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573. The plaintiff must show that the violation of the statute endangers a concrete interest that is more than simply execution of the law. When addressing the Legislature's power to confer standing on an individual, this Court remarked, "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n 3 (1997).

Constitutional concerns are at their height when the courts read a statute to encroach on Article III's standing requirement by conferring standing upon a litigant

without regard to the actual injury requirement, as with the Real Estate Settlement Procedures Act ("RESPA") at issue in this case. RESPA provides for relief in favor of a litigant who shows that he or she was charged for a settlement service involved in the violation of a kickback. In particular, 12 U.S.C. § 2607(a) provides:

> (a) Business referrals
>
> No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> * * *
>
> (d)(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

The Ninth Circuit, reading this statute, held that "[b]ecause RESPA gives Plaintiff a statutory cause of action[...]Plaintiff has standing to pursue her clams against Defendants." *Edwards v. The First American Corporation, et al*, 610 F.3d 514, 518 (9th Cir. 2010).

This broad reading cannot result in the creation of universal standing without a showing of actual injury and the other components of the judicial test for standing. *Raines v. Byrd*, supra, at 818-19. Contrary to the Ninth Circuit's decision in *Edwards*, RESPA should not be read to provide for a universal grant of standing because notions fundamental to the tripartite structure of our government mandate a rejection of this position. Under the Article III model of the scope of judicial function, standing serves as a gatekeeper to the federal courthouse. It determines whether, when, and by whom important questions can be adjudicated. In the federal system, standing defines the work of Article III courts and marks the boundary between the worlds of law and politics. Jan Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan L R 169, 170 (1968) and Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L J 679, 688 (1997). In short, the Ninth Circuit's decision cannot withstand scrutiny when viewed in light of Article III and the standing doctrine this Court has embraced.

C. Narrowing standing to permit litigants to sue in the absence of actual injury will dramatically increase costly litigation against businesses and individuals.

RESPA is just one of a myriad of federal statutes embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Fair Credit Report Act to the Truth in Lending Act, the Legislature has authorized suits based on a mere statutory violation alone. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Fair Credit Reporting Act, 15 U.S.C. § 1681n, allows a

consumer to recover up to $1,000 in damages in a civil suit as an alternative to actual damages sustained. The Truth in Lending Act, 15 U.S.C. § 1640, contains a similar alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,0000 without any showing of actual injury or damages. *See, e.g., Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2nd Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, a decision by this Court affirming the Ninth Circuit may well reach beyond RESPA. A decision from this Court to narrow the standing doctrine to permit a suit in the absence of an actual injury could be applied to upwards of fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15 U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq.* (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this case. This Court has required careful consideration of the propriety of certifying class actions, most recently in its decision reversing the Ninth Circuit's decision to certify the largest employment class action in history. *Wal-Mart Stores, Inc. v. Dukes, et. al.*, 131 S. Ct. 2541, 2556-57 (2011). Although this Court has recognized that class actions can be a useful tool to protect certain public rights, DRI and ASCDC believe that when used in connection with "no harm" statutes they pose a great potential for abuse by entrepreneurial lawyers seeking enormous fees. Stated simply, when a plaintiff has no actual injury at stake in

the lawsuit, only the lawyers who bring the suits – not the plaintiffs – benefit. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76 (2009). It is for this precise reason class actions are often viewed as nothing more than "money generators" for the lawyers who bring them. *Id.*

The cost attendant to defending "no harm" lawsuits cannot be overstated. The advent of electronic discovery has further increased litigation costs, particularly for large corporate defendants. Robert F. Carangelo, *et. al.*, *Cost-Shifting in Electronic Discovery*, 50 Dec Fed. Law. 35 (Nov/Dec 2003) (noting that the cost of production of electronic data in discovery is greater "than the costs associated with the old-fashioned production of paper documents[.]").[2] For new companies and those suffering under today's current economic climate, a major lawsuit, and the attendant costs, could sound the death knell. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010).

---

2. Rather than "a tool to collect information to aid the fact finder," discovery in today's litigation environment is more akin to a "weapon in the requesting party's arsenal to impact the outcome of a case irrespective of the merits[.]" White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, xiii (May 2010). The "*in terrorem* effect" of largely unregulated discovery is "promoting settlements that go well beyond perceived liability" and "driving up the cost of much litigation to levels entirely disproportionate to the underlying dispute." *Id.* at 18.

And corporations and individual businesses are not the only ones bearing this cost. The U.S. capital markets and economy are suffering from the relative ease in which lawsuits can be filed. Empirical research shows that the threat of litigation, particularly private securities class-action lawsuits, is a strong impediment to economic growth in the United States. *Id.* at 618. A 2007 study on the effects of private securities litigation on the competitiveness of the U.S. markets found that the prevalence of meritless lawsuits in the U.S. has driven away potential investors. A staggering 85% of CEOs indicated that they preferred London over New York "due to the litigation risk associated with U.S. Markets." *Id.* at 619, citing McKinsey & Co., *Sustaining New York's and the US' Global Financial Services Leadership 101* (2007). A different survey polling 334 senior executives of companies based in various countries, including the United States, United Kingdom, Germany, France, China, Japan, and India, revealed that nine out of ten companies who de-listed from a U.S. exchange in the last four years said that the litigation environment played some role in that decision. 33 Harv J L & Pub Pol'y at 619, citing the Fin. Servs. Forum, 2007 Global Capital Markets Survey 8 (2007). This, in turn, hampers economic growth in the United States, because the threat of class action suits is a primary disincentive to listing on U.S. exchanges. *Id.*[3]

---

3. The abuses attendant with use of the class action device has resulted in a growing public distrust of class actions. John H. Beisner, et. al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (April 2005). In a 2003 nationwide poll conducted by the United States Chamber of Commerce, a mere 5% of the respondents "thought consumers benefited the most from class actions; 47% viewed attorneys as the primary beneficiaries." *Id.* at 1444. District and intermediate appellate courts have similarly declined to certify classes

Careful adherence to the standing doctrine serves to guard against a proliferation of no-harm lawsuits. Litigation brought by entrepreneurial class action attorneys or those attempting to serve as a bureaucratic ombudsman for the federal government harms the civil justice system, both because it creates enormous litigation costs with no attendant benefit and because it destabilizes the carefully calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. And it also guards against plaintiff attorneys, and particularly class attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury. On the other hand, by allowing Congress to create a statutory cause of action so long as it comports with the constitutional strictures of Article III, defendants are incentivized to conform their conduct to the law.

It is therefore imperative that this Court adopt a rule that preserves this careful balance. And this Court can do so by upholding the right of Congress to create a statutory cause of action, but declining to allow it to do so in a manner that circumvents constitutional strictures.

---

where, on balance, the potential liability to the defendant was so disproportionate to the absence of any actual injury suffered by the plaintiffs that it raised due process concerns. *Seig v. Yard House Rancho Cucamonga, LLC*, 2007 WL 6894503 (C.D. Cal 2007); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *Pisciotta v. Old Nat. Bankcorp*, 499 F.3d 629 (7th Cir. 2007).

The doctrine of standing provides the key component to this balance by assuring that the judiciary's jurisdiction is limited to "cases" or "controversies" as originally contemplated by the Framers of our Constitution. The Ninth Circuit's decision, which disrupts this balance by permitting a cause of action without the requisite injury, must therefore be reversed.

CONCLUSION

For all the foregoing reasons, *Amici* urge this Court to reverse the Ninth Circuit's decision.

Respectfully submitted,

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
535 Griswold,
Suite 2400
Detroit, MI 48226
(313) 983-4801

R. MATTHEW CAIRNS
PRESIDENT OF DRI
Counsel of Record
55 W. Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

Attorneys for Amici Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 18 201
OFFICE OF THE CL

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, Successor in Interest to The First American Corporation, and FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, Individually and on behalf of all others similarly situated,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) IN SUPPORT OF THE RESPONDENT

MARC ROTENBERG
Counsel of Record
JOHN VERDI
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

October 18, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 7

I. As This Court Has Recognized, Privacy Laws Serve an Important Purpose and Protect Individual Privacy Interests 7

II. Privacy Laws Depend Upon Congress' Power to Define Injuries in Fact and to Provide for Statutory Damages. 16

A. The Violation of a Privacy Law Produces an Immediate Injury in Fact Sufficient to Confer Standing Under Article III..... 16

B. Statutory Damages Are Critical to the Structure of Modern Privacy Law 24

III. Because New and Emerging Business Practices Pose a Particular Threat to Individual Privacy, Congress Must Maintain the Power to Define and Remedy Privacy Injuries..... 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 19

Bartnicki v. Vopper, 532 U.S. 514 (2001) 9

Doe v. Chao, 540 U.S. 614 (2004) 9

Doe v. Reed, 130 S. Ct. 2811 (2010) 8

Graczyk v. West Pub. Co., --F.3d--, 2011 WL 4469953 (7th Cir. Sept. 28, 2011) 21

Harris v. Blockbuster Inc., 622 F. Supp. 2d 396 (N.D. Tex 2009) 27

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 19

In re JetBlue Airways Corp. Privacy Litigation, 379 F. Supp. 2d 299 (E.D.N.Y. 2005) 26

Johnson v. West Pub. Corp., 2011 WL 3422756 (W.D. Mo. Aug. 3, 2011) 21

Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010) 23

Lane v. Facebook, Inc., 2009 WL 3458198 (N.D. Cal. Oct. 23, 2009) 27

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 16, 18, 29

Massachusetts v. EPA, 549 U.S. 497 (2007) 17, 19

Massachusetts v. EPA, 549 U.S. 497, 516 (2007) 19

Nat'l Aeronautics & Space Admin. v. Nelson, 131 S. Ct. 746 (2011) 7

Parus v. Cator, No. 05–C–0063–C, 2005 WL 2240955 (W.D. Wis. Sept. 14, 2005) 21

Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905) 24

Pisciotta v. Old Nat. Bancorp, 499 F.3d 629 (7th Cir 2007) 23, 26

Reno v. Condon, 528 U.S. 141 (2000) 9

Roberts v. Source for Public Data, 2008 WL 5234675 (W.D. Mo. Dec. 12, 2008) 21

Ruiz v. Gap, Inc., 380 Fed. App'x. 689 (9th Cir. 2010) 23, 26

Sorrell v. IMS Health, Inc, 131 S Ct. 2653 (2011) 7

Stollenwerk v. Tri-West Health Care Alliance, 254 Fed. Appx. 664 (9th Cir. 2007) 26

U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749 (1989) 8

Warth v. Seldin, 422 U.S. 490 (1975) 17, 19

STATUTES

12 U.S.C. § 3417 (2006) 18

15 U.S.C. § 1640 (2006) 18

15 U.S.C. § 1681n (2006) 18

18 U.S.C. § 2511-2522 (2006) 17

18 U.S.C. § 2520(a) (2006) 17

18 U.S.C. § 2707 (2006) 18

18 U.S.C. § 2710 (2006) 18

18 U.S.C. § 2710(b)(1) (1988) 14

18 U.S.C. § 2721(a)(1) (2006) 14

18 U.S.C. § 2722(a) (2006) 20

18 U.S.C. § 2724 (1994) 14

42 U.S.C. § 2000aa (2006) 18

47 U.S.C. § 227 (2006) 18
47 U.S.C. § 551 (2006) 18
47 U.S.C. § 551(b)(1) (2006) 13
47 U.S.C. §551(f)(1) (2006) 13
5 U.S.C. § 552a(g)(1) (2006) 13
50 U.S.C. § 1828 (2006) 18
Pub. L. 90-351, § 801 (1968) 17
Pub. L. No. 93-579 § 2 (1974) 10, 11, 13

CONSTITUTIONAL PROVISIONS

Art. I, § 1 29
Article III, § 2 16

I

INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center (EPIC)[1] is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[2] EPIC has participated as amicus curiae in several cases before this Court and other courts concerning the application and interpretation of federal privacy statutes, including *FCC v. AT&T*, 131 S. Ct. 1177 (2011) (Personal privacy exemption in the Freedom of Information Act); *Quon v. City of Ontario*, 130 S. Ct. 2811 (2010) (Electronic Communications Privacy Act); *Doe v. Chao*, 540 U.S. 614 (2003) (Privacy Act); *Reno v. Condon*, 528 U.S. 141 (2000) (Driver's Privacy Protection Act); *Kehoe v. Fid. Fed. Bank &*

---

[1] Letters of consent have not been lodged with the Court because on July 11, 2011, Petitioners lodged with the Court their "consent to the filing of amicus curiae briefs, in support of either party or of neither party," and on August 12, 2011, Respondent lodged with the Court their "consent to the filing of amicus curiae briefs, in support of either party or of neither party." In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC Appellate Advocacy Fellow Alan Butler and EPIC Consumer Protection Fellow David Jacobs contributed to the preparation of this brief.

Trust, 421 F.3d 1209 (11th Cir. 2005), *cert. denied*, 126 S Ct. 1612 (2006) (Drivers Privacy Protection Act); and Harris v. Blockbuster Inc., 622 F. Supp. 2d 396 (N.D. Tex. 2009) (Video Privacy Protection Act).

At issue in this case is the constitutional standing to sue under Section 8 of the Real Estate Settlement Procedures Act ("RESPA"), which was enacted to combat abusive practices, such as kickbacks, in real estate settlements. But this case also raises the troubling prospect that the Court's consideration of that issue may adversely impact the statutory damages provisions, routinely established by Congress, that are central to the protection of privacy. Indeed, some amici in support of Petitioner have already made this argument.

EPIC supports the outcome reached by the Ninth Circuit. Enforcement provisions granting a private right of action, such as the one in RESPA at issue in this case, are found in almost every federal privacy statute. They are necessary not only because of the difficulty in quantifying harm in privacy cases but also because of the problems associated with establishing a causal link between poor data security practices and the injuries, such as identity theft and financial fraud, that result.

If Congress cannot establish statutory damages to enforce the privacy and security obligations of those who collect and use the personal data of others in the course of their business or agency functions, then such laws will be rendered ineffective.

SUMMARY OF THE ARGUMENT

In the modern era in which organizations build elaborate databases containing extensive details on their customers and the users of their services privacy is protected through federal statutes. These laws require organizations to safeguard personal information, to ensure that it is accurate and timely, and that its use is consistent with the purpose for which it was collected. Above all, these laws minimize the risk of harm to individuals that could result from the failure of organizations to protect the personal data that is within their control. The enforcement provisions established by Congress in these laws are the cornerstone of the statutory structure.

In passing privacy statutes such as the Privacy Act of 1974, the Electronic Communications Privacy Act of 1986, the Video Privacy Protection Act of 1988, and the Driver's Privacy Protection Act of 1994, Congress recognized individual rights of privacy related to the collection, use, and disclosure of personal information. Central to the effectiveness of these public laws are statutory damages provisions that provide the opportunity for individuals to enforce their rights against those entities that are subject to the Act. If individuals were required to prove harm in each such circumstance, it would become virtually impossible to enforce privacy safeguards in the United States.

As this Court has long recognized, a party may meet Article III's requirement of an injury-in-fact by showing a violation of a statute enacted by Congress that "creates legal rights, the invasion of which

creates standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted). When these rights are violated, the injury-in-fact relevant to the standing inquiry is the violation of the relevant provisions set out in the statute, and not the harmful consequences that may ultimately result. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). This distinction between injury-in-fact and resulting harm is particularly significant in privacy matters because, in many cases, the ultimate harm is far removed from the initial violation of the statute. A computer criminal might wait days, weeks, or even months to profit from the negligent security practices that made it possible to obtain an individual's personal information, and it is quite likely that the individual will never be able to trace back to the source the violation of the statutory obligation that gave rise to the harm.

To ensure the effectiveness of privacy laws, Congress established statutory damage provisions to protect personal information. Statutory damage provisions help ensure that individuals can obtain relief when organizations fail to safeguard personal information; they also deter conduct that Congress has determined is likely to create significant privacy risks. An individual harmed by the improper disclosure of personal information could theoretically sue under a tort or contract theory, but common-law remedies are ill-suited for the modern era in which personal information is routinely collected and stored in vast databases far beyond the control of the individual whose interest are directly impacted by the use and disclosure of this information. As Chief

Justice Rehnquist stated "We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations." *Bartnicki*, 532 U.S. 514, 541 (2001) (Rehnquist, C.J, dissenting). To avoid these obstacles to effective enforcement, Congress frequently provides statutory damages for privacy law violations. Privacy laws may also require notification and data correction procedures in an attempt to avoid harms before they occur.

Deferring to the need for Congress legislate effectively is particularly important as more and more information about Americans is held by companies and used in ways over which individuals have no meaningful control. Upholding Congress' authority to set out effective statutory schemes is important both to provide redress to consumers and to ensure that companies develop practices that do not place users at risk. "All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected." *Bartnicki*, 532 U.S. at 549 (Rehnquist, C.J., dissenting) (citing S. REP. NO. 1097, at 69 (1968), *reprinted in* 1968 U.S.C.C.A.N., 2112, 2156).

According to the Federal Trade Commission, identity theft has remained the number one concern of American consumers over the past decade. Federal Trade Commission, "FTC Releases List of Top Consumer Complaints in 2010; Identity Theft Tops

the List Again" (Mar. 8, 2011).[3] The Privacy Rights Clearinghouse reports that data breaches are on the rise. Privacy Rights Clearinghouse, "Chronology of Data Breaches: Security Breaches 2005 – Present."[4] This is not the time to limit the ability of Congress to safeguard the well-established right of privacy.

---

[3] *Available at* http://www.ftc.gov/opa/2011/03/topcomplaints.shtm

[4] *Available at* https://www.privacyrights.org/data-breach.

ARGUMENT

I. As This Court Has Recognized, Privacy Laws Serve an Important Purpose and Protect Individual Privacy Interests

As this Court made clear in *Sorrell v. IMS Health, Inc.*, protecting the privacy of personal information is an important governmental purpose. 131 S Ct. 2653, 2668 (2011) ("It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential."). In *Sorrell*, this Court emphasized that "[t]he capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. *Id.* at 2672. The Vermont statute in *Sorrell* was held unconstitutional in large part because it did not contain strong enough, across the board, privacy protections. *Id.* As this Court said, "[p]rivacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers." *Id.*

This Court has highlighted the importance of privacy in other recent cases. In *National Aeronautics & Space Administration v. Nelson*, 131 S. Ct. 746 (2011), this Court recognized the "constitutional privacy 'interest in avoiding disclosure of personal matters,'" while it upheld NASA's hiring practices. 131 S Ct. 746, 751 (2011) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977)). In *Doe v. Reed*, 130 S. Ct. 2811

(2010), concerning the disclosure of the identity of a petitioner signer, which may involve the release of "all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships," *id.* at 2824, Justice Alito wrote that "requiring such disclosures, however, runs headfirst into a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association.' *Id.* Justice Thomas further noted "[t]his Court has long recognized the 'vital relationship between' political association 'and privacy in one's associations.'" *Id.* at 2839 (Thomas, J., dissenting)(citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)). Thus, the protection of privacy is a fundamental concern.

This Court has also recognized that individuals have a legal interest in "avoiding disclosure of personal matters." *U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 762 (1989) (citing *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (footnotes omitted)). The interest in avoiding disclosure becomes even more important when that information would not otherwise be freely available, because it was collected through a complex process. *Id.* at 764. Even where information "is not wholly 'private'," the individual retains an interest in "limiting disclosure or dissemination of the information." *Id.* at 770. These principles extend as well to statutes that seek to protect the privacy of communications. As this Court has said, "[i]n a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively." *Bartnicki v. Vopper*, 532 U.S.

514, 533 (2001) (citing President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 202 (1967)).

This Court has had many opportunities to review statutes designed to protect privacy interests; it has made clear that Congress plays a critical role in the protection of individual privacy. In *Reno v. Condon*, this Court upheld the Driver's Privacy Protection Act ("DPPA") as a "proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause." *Reno v. Condon*, 528 U.S. 141, 147 (2000). This Court has also recognized Congress' authority to create statutory privacy rights, as well as its ability to dictate recovery available for violations of those rights. *See, e.g., Doe v. Chao*, 540 U.S. 614 (2004).

In order to safeguard privacy interests, Congress has enacted modern privacy statutes built around the "Fair Information Practices" framework that allocates rights and responsibilities in the collection and use of personal information. Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy*, 2001 Stan. Tech. L. Rev. 1, ¶45 (2001). The concept of Fair Information Practices was first set out in the influential 1973 report *Records, Computers, and the Rights of Citizens*. U.S. Dep't of Health, Educ. & Welfare: Report of the Sec'y's Advisory Comm. on Automated Personal Data Sys., Records, Computers, and the Rights of Citizens (1973). The Code of Fair Information Practices describes basic privacy practices, such as:

- There must be no personal-data record-keeping systems whose very existence is secret.

- There must be a way for an individual to find out what information about him is in a record and how it is used.
- There must be a way for an individual to prevent information obtained about him for one purpose from being used or made available for other purposes without his consent.
- There must be a way for an individual to correct or amend a record of identifiable information about him.
- Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take reasonable precautions to prevent misuse of the data.

Id. at 41.

This framework formed the basis of the Privacy Act of 1974 and many privacy laws since. R. Turn and W.H. Ware, *Privacy and Security Issues in Information Systems*, in ETHICAL ISSUES IN THE USE OF COMPUTERS 133, 138 (Deborah G. Johnson & John W. Snapper eds. 1985). With the Privacy Act, Congress recognized that "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies." Pub. L. No. 93-579 § 2 (1974).

In the Privacy Act of 1974 Congress set out findings and purposes that help make clear the basis

of the statutory right of privacy. In the Findings, Congress said:

> (1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies; (2) the increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information; (3) the opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems; (4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States; and (5) in order to protect the privacy of individuals identified in information systems maintained by Federal agencies, it is necessary and proper for the Congress to regulate the collection, maintenance, use, and dissemination of information by such agencies.

Id. § 2(A). Congress also set out the purposes of the Act, necessary for the protection of individual privacy:

The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to--(1) permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated by such agencies; (2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent; (3) permit an individual to gain access to information pertaining to him in Federal agency records, to have a copy made of all or any portion thereof, and to correct or amend such records; (4) collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information; (5) permit exemptions from the requirements with respect to records provided in this Act only in those cases where there is an important public policy need for such exemption as has been determined by specific statutory authority; and (6) *be subject to civil suit for any damages which occur as a result of willful or*

> *intentional action which violates any individual's rights under this Act.*

Id. § 2(B). (Emphasis added).

To further these purposes, the Privacy Act provides a private right of action to any individual who (1) requests an amendment to their record under § 552a(d)(3) that is denied or improperly reviewed; (2) is refused access to records under § 552a(d)(1); (3) is subject to an adverse determination as a result of failure to properly maintain a record; or (4) suffers an adverse effect as a result of the governments failure to comply with any provision of § 552a. 5 U.S.C. § 552a(g)(1) (2006). Without such rights, established by statute, there would be no effective means to address the concerns identified by Congress or to pursue the objectives Congress sought to achieve.

Many other statutes reflect purposes similar to those of the Privacy Act, assign responsibilities associated with the collection and use of personal information to those who collect data, and give rights to individuals, the "data subjects," such as the right to inspect and correct information. These statutes typically grant a private right of action for statutory damages when their provisions are violated. The Cable Communications Policy Act of 1984 prevents cable operators from collecting "personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned." 47 U.S.C. § 551(b)(1) (2006). The Act provides that "[a]ny person aggrieved by any act of a cable operator in violation of this section may bring a civil action in a United States district court." 47 U.S.C. §551(f)(1) (2006). The Video Privacy Protection Act, which creates liability against "a

video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider," 18 U.S.C. § 2710(b)(1) (1988), contains a similar provision. 18 U.S.C. §2710(c)(1). The 1994 Driver's Privacy Protection Act prevents disclosure of any "personal information . . . about any individual obtained by the department in connection with a motor vehicle record." 18 U.S.C. § 2721(a)(1) (2006). This Act specifies that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court." 18 U.S.C. § 2724 (1994).

Congress enacted these and other privacy laws to protect and promote the privacy interests of individuals. Modern informational privacy, in particular, concerns "an individual's control over the processing--*i.e.*, the acquisition, disclosure, and use--of personal information." Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 Stan. L. Rev. 1193, 1203 (1998). Informational privacy laws accordingly provide mechanisms to increase individuals' control over the information that government or private organizations gather and disseminate about them. These enforcement mechanisms are critical to the protection of individual privacy.

Congress continues to enact privacy laws in response to developments in technology and to new business practices. Consumers face a number of complex and difficult trade-offs in the area of online

data protection that require special attention. Consumer decisions related to the collection and protection of personal data on the Internet are inhibited by information asymmetries and other behavioral barriers. *Understanding Consumer Attitudes About Privacy: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the House Comm. on Energy and Commerce* (Oct. 13, 2011) (testimony of Prof. Alessandro Acquisti).[5] As Professor Acquisti describes, "US consumers are often ill-informed about the collection and usage of their personal information, and the consequences of those usages. This puts them in a position of asymmetric information, and sometimes disadvantage, relative to the data holders that collect and use that information." *Id.*

As Professor Acquisti suggests, privacy laws also help to restore information symmetry and promote economic efficiency by requiring transparency in data collection practices and imposing liability on the entity in control of the information. Businesses that maintain consumer data are in a better position to safeguard the data. The data collectors are the "least cost avoiders" and can more efficiently protect the data in their possession than could the data subject who has transferred control over their personal information. *See generally* GUIDO CALABRESI, THE COST OF ACCIDENTS (1970). Thus, privacy laws allocate rights and responsibilities in the collection

---

[5] *Available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/CMT/101311/Acquisti.pdf.

and use of personal data both to protect the interests of the individual and to efficiently safeguard personal data.

II. Privacy Laws Depend Upon Congress' Power to Define Injuries in Fact and to Provide for Statutory Damages.

As this Court has recognized, a party may meet Article III's requirement of an injury-in-fact by showing a violation of a statute, enacted by Congress, that "creates legal rights, the invasion of which creates standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted). Congress has exercised this power by passing laws regulating the collection, use, and disclosure of personal information in a variety of contexts, thereby providing standing for individuals whose privacy rights are violated. Because privacy harms are often unquantifiable or intangible, Congress provided statutory damages to ensure that privacy violations were adequately deterred and remedied.

A. The Violation of a Privacy Law Produces an Immediate Injury in Fact Sufficient to Confer Standing Under Article III.

Article III, § 2 of the United States Constitution limits the judicial power to "Cases" and "Controversies." Part of the "irreducible constitutional minimum of standing" required by Article III is an "injury-in-fact—an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61. This Court has recognized the important role that Congress

plays in protecting the legal rights of individuals, stating that an injury in fact "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (citation omitted). Congress' power to affect standing allows it to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S., at 580) (Kennedy, J., concurring) (emphasis added). In creating new rights, however, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id.*

In enacting privacy laws, Congress has complied with the above requirements. Privacy laws define a range of injuries relating to the improper collection, handling, and disclosure of personal information, and relate these injuries to specific classes of persons entitled to bring suit. For example, in the Wiretap Act, 18 U.S.C. § 2511 *et seq.* (2006), the injury occurs with the "interception" of a "wire, oral, or electronic communication." *Id.* § 2511(1)(a)-(e). The harm is the unlawful intrusion itself, irrespective of any subsequent or consequential damages. Congress passed the Wiretap Act to remedy "extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation." Pub. L. 90-351, § 801 (1968). Finally, the class of persons entitled to sue consists only of those who have suffered the injury: "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act. 18 U.S.C. § 2520(a) (2006). Thus,

the Wiretap Act is not like the Endangered Species Act at issue in *Lujan*, which gave "any person" the right to enjoin the United States for any "violation of any provision" of the Act—in effect allowing anyone to sue to enforce the public's "nonconcrete interest in the proper administration of the laws." 504 U.S. at 516-17.

Likewise, after the public disclosure of Supreme Court nominee Robert Bork's video rental records, *see* S. Rep. No. 100–599, at 4-5 (1988), Congress passed the Video Privacy Protection Act, 18 U.S.C. § 2710 (2006). Congress defined the injury to privacy as the "knowing[] disclos[ure], to any person, [of] personally identifiable information concerning any consumer of [a video tape service] provider . . . ." 18 U.S.C. § 2710(b) (2006). Congress specified that "any person aggrieved by an act of a [video tape service provider] in violation of this section may bring a civil action" in court. *Id.* at § 2710(c). Thus, the class of individuals entitled to sue is equal to the class of individuals suffering the statutory violation.

Congress has passed many other statutes protecting specific classes of individuals against privacy injuries.[6] Under these laws, plaintiffs

---

[6] *See* Telephone Consumer Protection Act, 47 U.S.C. § 227 (2006); Cable Communications Privacy Act, 47 U.S.C. § 551 (2006); Fair Credit Reporting Act, 15 U.S.C. § 1681n (2006); Truth in Lending Act, 15 U.S.C. § 1640 (2006); Fair and Accurate Credit Transactions Act 15 U.S.C. § 1681n (2006); Stored Communications Act, 18 U.S.C. § 2707(c) (2006); Foreign Intelligence Surveillance Act, 50 U.S.C. § 1828 (2006); Privacy Protection Act, 42 U.S.C. §

bringing suit assert their own rights against the unlawful intrusion, the misuse of their data, the inadequate security practices, and so forth, and not the rights of others. Thus, privacy plaintiffs possess a sufficiently "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts v. EPA*, 549 U.S. at 517.

Because Congress can define injuries by statute, "the invasion of which creates standing," *Warth*, 422 U.S., at 500, it follows that the injury relevant to the standing inquiry is the statutory violation itself, not the harmful consequences that may ultimately result. In the words of a current Justice of this Court, legal injury is "by definition *no more* than the violation of a legal right; and legal rights can be created by the legislature . . . ." Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983) (emphasis added). This Court has recognized the distinction between injury-in-fact and resulting harm, holding that that plaintiffs suffering an injury-in-fact need not wait until the harmful consequences of that injury have materialized before enforcing their rights.[7] It is only logical that injury in fact be

---

2000aa (2006); Right to Financial Privacy Act, 12 U.S.C. § 3417 (2006).

[7] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (holding that African-American testers had standing to enforce the Fair Housing Act even though the challenged violation could not have harmed them because

distinct from resulting harm. Requiring a plaintiff to produce a detailed audit of his damages merely to pass through the courthouse door would overturn the notice-pleading model of the civil justice system.

Indeed, the distinction between injury-in-fact and resulting harm is especially important in the context of privacy laws, because individuals rarely experience the harmful consequences concurrently with the statutory violation. For example, the Driver's Privacy Protection Act ("DPPA") prohibits any person from unlawfully obtaining or disclosing personal information from a motor vehicle record. 18 U.S.C. § 2722(a). Congress passed DPPA to prevent harms similar to those that affected Rebecca Schaeffer, a young actor who was stalked and murdered after her killer obtained her home address from the California Department of Motor Vehicles. 139 Cong. Rec. S15762 (Nov. 16, 1993) (statement of Sen. Boxer). The congressional record is filled with the stories of other victims who have been murdered, stalked, threatened, or robbed as a result of the disclosure of

---

they never intended to rent from the discriminatory realtor); *Heckler v. Matthews*, 465 U.S. 728 (1984) (male plaintiff had standing to challenge a gender-based social security classification despite the fact that invalidating the classification would not affect the amount of benefits he received); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding that nonminority contractors had standing to challenge a government program that that gave preference to minority contractors without the need to show that they would have received the contracts in the absence of discrimination).

their personal information. *See id.* at S15765 (statement of Sen. Robb). In these cases, the injury in fact occurs at the moment an individual's driving records are disclosed in violation of the statute. The resulting harm, however, may not occur until days, weeks, or even months later, when the victim is robbed, raped, or murdered. It is clear that robbery, rape, and murder constitute injuries sufficient to give a plaintiff standing under Article III; it is equally clear that by the time these harms materialize it is simply too late.

The recognition that the relevant injury occurs when the statute is violated, and not when the harm ultimately results, has led many courts to find standing for statutory violations of the DPPA. *See Graczyk v. West Pub. Co.*, 2011 WL 4469953, at *2 (7th Cir. Sept. 28, 2011) (holding that plaintiffs have standing to sue when their information was disclosed in violation of DPPA); *Parus v. Cator*, No. 05–C–0063–C, 2005 WL 2240955, at *5 (W.D. Wis. Sept. 14, 2005) ("It is true that plaintiff has not alleged that he suffered injury as a *result* of defendant Kreitlow's obtaining his personal information. However, under the statute, improperly obtaining plaintiff's information was an injury.") (emphasis in original); *Roberts v. Source for Public Data*, 2008 WL 5234675, at *5 (W.D. Mo. Dec. 12, 2008) ("The Complaint's allegations that the Defendants unlawfully obtained Plaintiffs' highly restricted personal information, in violation of their privacy rights under the DPPA, suffice to establish injury-in-fact."); *Johnson v. West Pub. Corp.*, 2011 WL 3422756, at *19 (W.D. Mo. Aug. 3, 2011) ("In fashioning the DPPA, Congress created

a right to privacy, the invasion of which creates an injury sufficient to create standing.").

The Federal Trade Commission's enforcement action against LexisNexis provides another crucial example of the distinction between injury in fact and resulting harm. *In the Matter of Reed Elsevier Inc. and Seisint Inc.*, FTC File No. 052-3094 (Mar. 27, 2008).[8] The FTC brought a complaint against LexisNexis after the company violated the FTC Act by collecting personal information, including social security numbers, from public and nonpublic sources, then failing to "provide reasonable and appropriate security" for this information. *Id.* at 3. Criminals exploited these inadequate security measures by accessing the database and gaining sensitive information about over 300,000 customers. In some cases, the criminals used the sensitive information to open credit accounts in the names of consumers whose information was disclosed and then made purchases using these accounts. *Id.* In other cases, criminals used the sensitive information to activate new credit cards that they had stolen from consumers. As above, the injury in fact occurred immediately, when LexisNexis allowed personal information to be disclosed, and not later, when the consumers learned that they had suffered financial harm from the unauthorized purchases.[9]

---

[8] http://www.ftc.gov/os/caselist/0523094/080327complaint.pdf

[9] A similar problem arose in the FTC's investigation of Choicepoint, a data broker that disclosed personal information of 163,000 American consumers to a criminal

Because standing depends on the existence of an injury in fact, and not the eventual occurrence of harmful consequences, the only circuits to have analyzed the question of standing in identity-theft cases have recognized that the injury occurs at the time of the breach. In *Pisciotta v. Old Nat. Bancorp*, the Seventh Circuit held that a class of consumers had standing to sue a bank whose poor security procedures resulted in the disclosure of their personal information. 499 F.3d 629 (7th Cir. 2007). Once the plaintiffs in *Piscotta* established that a breach occurred, "the fact that the plaintiffs anticipate[d] that some greater potential harm might follow the defendant's act d[id] not affect the standing inquiry." *Id.* at 634. In *Krottner v. Starbucks Corp.*, several employees sued Starbucks, claiming that the company's negligence caused the theft of a laptop containing social security numbers of approximately 97,000 Starbucks employees. 628 F.3d 1139 (9th Cir. 2010). The court held that plaintiffs had standing, even though some of them had suffered no "anxiety and stress," did not have to spend money for credit monitoring services, and had not suffered identity theft or fraudulent purchases. *Id.* at 1142-43. *See also Ruiz v. Gap, Inc.*, 380 Fed. App'x. 689 (9th Cir. 2010) (holding that a plaintiff had standing to sue over the alleged negligent disclosure of his social

---

ring engaged in identity theft. The FTC's action against the company was predicated on the improper disclosure, not on the harm that resulted. *See ChoicePoint Inc.*, FTC File No. 052-3069 (Jan. 26, 2006), http://www.ftc.gov/os/caselist/choicepoint/choicepoint.htm.

security number, even though he had "failed to establish a genuine issue of material fact on whether he suffered damages" resulting from the injury).

B. Statutory Damages Are Critical to the Structure of Modern Privacy Law

In ensuring that privacy laws would be effective, Congress relied on more than its ability to create standing. Indeed, without statutory damage provisions, privacy laws would create rights with no remedies. Statutory damage provisions ensure that individuals can seek compensation for and deter privacy violations. Privacy violations have long been redressable at common law, *see* Restatement (Second) of Torts §652A(1) (1977) ("One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other."); *see, e.g., Pavesich v. New England Life Ins. Co.*, 122 Ga. 190 (1905). However, Congress recognized that common-law tort and contract remedies do not adequately protect individual privacy. Harms suffered as a result of privacy violations are often difficult to quantify. Personal information is now routinely collected and stored in vast databases beyond individual control. Those individuals' interests are directly impacted by the use and disclosure of their information. Adopting the general framework of Fair Information Practices, Congress created statutory damage provisions to ensure adequate enforcement of privacy interests.

The nature of privacy dictates that privacy injuries are broader and more important than simple pecuniary loss. As Professor, and later Solicitor General, Charles Fried wrote, "privacy is not just one

possible means among others to insure some other value, [it is] necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust." Charles Fried, *Privacy*, 77 Yale L.J. 475-93 (1968), reprinted in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 205 (ed. Ferdinand D. Schoeman 1984). He concludes:

> The concept of privacy requires, as we have seen, a sense of control and a justified acknowledged power to control aspects of one's environment . . . we at once put the right to control as far beyond question as we can and at the same time show how seriously we take this right.

Id. at 219. Privacy laws seek to restore this control and the civil remedies provided are the means by which the "justified acknowledged power," in Professor Fried's phrase, is realized.

Privacy laws in the United States protect individuals from a wide range of harms, including intrusions upon their physical, informational, decisional, proprietary, and associational interests. ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 4 (2007). These intrusions might be intentional or mistaken; they might be caused by government or private organizations. Freedom from such intrusions serves to foster a free and open society, promote human dignity and individuality, and limit threats to individual autonomy. *Id.* at 7 (summarizing values as described in privacy literature).

Privacy laws also guard against an increased risk of identity theft, financial loss, erroneous credit information, and even bodily harm. As with mental

and emotional distress or loss of reputation and trust, the harm that this increased risk represents is difficult to quantify. Even though an increased risk of future harm may confer standing, such a risk is typically insufficient to allow for recovery under common-law claims. *See, e.g., Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629 (7th Cir. 2007) ("Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy."); *Ruiz v. Gap, Inc.*, 380 Fed. App'x. 689 (9th Cir. 2010) (denying recovery under breach of contract and invasion of privacy theories based on increased risk of identity theft); *Stollenwerk v. Tri-West Health Care Alliance*, 254 Fed. Appx. 664, 667 (9th Cir. 2007) (denying a claim for credit monitoring damages because plaintiffs did not show that their information was misused in any way, or that credit monitoring was necessary, "given that Plaintiffs could place fraud alerts with the major credit agencies and receive copies of their credit reports free of charge."). Perhaps the court in *In re JetBlue Airways Corp. Privacy Litigation* provides the bluntest illustration of the inadequacy of common-law remedies, denying a breach of contract claim because "[t]here is . . . no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large." 379 F. Supp. 2d 299, 328 (E.D.N.Y. 2005). Thus, even when individuals are able to establish standing for privacy injuries, the increased risk of harm that individuals suffer will go unremedied without statutory damages.

III. Because New and Emerging Business Practices Pose a Particular Threat to Individual Privacy, Congress Must Maintain the Power to Define and Remedy Privacy Injuries.

Among amici for Petitioners are companies whose business practices implicate the very privacy interests that Congress' has sought to address through the enactment of federal privacy laws. These amici seek to avoid accountability for the collection and use of the personal information that they obtain. Facebook, et al. Br. 3. They hope to curtail Congress' long-established power to safeguard the privacy interests of American consumers. And they seek to set themselves apart from others—financial institutions, medical service companies, Internet service providers, telecommunications firms, cable operators, video rental service providers, educational institutions, and federal and state agencies—that are subject to federal privacy laws

The business practices of amici raise precisely the concerns that have typically given rise to action by Congress. In 2007, Facebook announced "Beacon", and began to routinely disclose information about the purchases of its users to the company's business partners without the consent of users. Beacon violated both the company's privacy policy, and, with respect to video rental information, the Video Privacy Protection Act. *See Harris v. Blockbuster Inc.*, 622 F. Supp. 2d 396 (N.D. Tex 2009); *Lane v. Facebook, Inc.*, 2009 WL 3458198 (N.D. Cal. Oct. 23, 2009). Facebook did not notify users of its change in business practices, nor did the company give users the ability

to opt out of the program. Instead, Facebook unilaterally decided to change the way it disclosed users' personal information. User protest eventually led Facebook to cancel Beacon. Jaikumar Vijayan, *Privacy advocates hail Facebook's plan to shutter Beacon*, COMPUTERWORLD (Sept. 28 2009).[10]

Google also dramatically changed its business practices by effectively requiring that users of Google's email service Gmail also subscribe to Google's social network service Buzz. Byron Acohido, *Google Buzz fuels rising privacy, security concerns*, USA TODAY (Feb. 16, 2010).[11] As a result, Google automatically disclosed pictures, video, text, and other data that users posted to websites such as Picasa and YouTube with the e-mail accounts of the users' frequent contacts. The company's disclosure of user data meant that, for example, the names of a doctor's patients, a journalist's contacts, or a lawyer's client would be made public in violation of the confidentiality that normally attaches to those relationships. *See* Don Cruse, Lawyers (or Journalists) with Gmail Accounts: Careful with the Google Buzz, The Supreme Court of Texas Blog (Feb.

---

[10] *Available at* http://www.computerworld.com/s/article/9138373/Privacy_advocates_hail_Facebook_s_plan_to_shutter_Beacon.

[11] *Available at* http://content.usatoday.com/communities/technologylive/post/2010/02/google-buzz-facing-privacy-security-storm-1/1

11, 2010).[12] Eventually, the Federal Trade Commission undertook an investigation of Google Buzz and the program was discontinued. Federal Trade Commission, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network: Google Agrees to Implement Comprehensive Privacy Program to Protect Consumer Data* (Mar. 30, 2011).[13]

These emerging privacy risks, and the growing public concern about the misuse of personal data, make it especially important that Congress retain the power to respond to changing technology and new business practices by updating privacy laws to address new challenges. Although Petitioners' amici might prefer to avoid the responsibilities associated with the collection and use of personal information (even though many business in the United States are routinely subject to these obligations), they should not use this case to put their business activities beyond the reach of Congress. This Court has been vigilant in using the requirement of injury-in-fact to ensure that the Executive's duty to "take Care that the Laws be faithfully executed" is not infringed, *see Lujan*, 504 U.S. at 577 (quoting Art. II, § 3); it should be equally vigilant in guarding against transferring from Congress to the courts the vesting of "[a]ll legislative powers herein granted." Art. I, § 1.

---

[12] *Available at http://www.scotxblog.com/legal-tech/lawyer-privacy-on-google-buzz/.*

[13] *Available at* http://www.ftc.gov/opa/2011/03/google.shtm.

CONCLUSION

Amicus respectfully ask this Court to deny Petitioners' motion and uphold the decision of the Ninth Circuit and to remand to the district court with instructions to give full consideration to the merits of the plaintiff's claims.

Respectfully submitted,

MARC ROTENBERG
JOHN VERDI
ELECTRONIC PRIVACY
INFORMATION
CENTER (EPIC)
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140

October 18, 2011

AMICUS CURIAE BRIEF

RECORD
FILED

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR EXPERIAN INFORMATION SOLUTIONS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

DANIEL J. MCLOON
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 489-3939

MEIR FEDER
Counsel of Record
D. THEODORE RAVE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Counsel for Amicus Curiae

August 26, 2011

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. CONGRESS'S AUTHORIZATION OF STATUTORY DAMAGES CANNOT CONFER ARTICLE III STANDING ON PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT 7

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright,
468 U.S. 737 (1984) 8

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 21

Bateman v. American Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 17

Beaudry v. Telecheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 6, 13

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 21

Crabill v. Trans Union, L.L.C.,
259 F.3d 662 (7th Cir. 2001) (Posner, J.) 11

Doe v. Chao,
540 U.S. 614 (2004) 5, 10, 19

Douglas v. Cunningham,
294 U.S. 207 (1935) 9

Evans v. U-Haul Co. of California,
No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS
82026 (C.D. Cal. Aug. 14, 2007) 16, 17

Federal Election Comm'n v. Akins,
524 U.S. 11 (1998) 9, 10

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 11

Geiger v. Consumerinfo.com, Inc.,
No. SACV11-455 JVS (C.D. Cal.) 15, 23

Harris v. Experian Information Solutions, Inc.,
No. 6:06-cv-1808-GRA
(D.S.C. June 30, 2009) 14, 23

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 9

Hayburn's Case,
2 U.S. (Dall.) 409 (1792) 13

In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) (Posner, J.) 21

In re Trans Union Corp. Privacy Litig.,
211 F.R.D. 328 (N.D. Ill. 2002), *appeal dismissed sub nom, Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003) 24

Kesler v. Ikea U.S., Inc.,
No. SACV 07-568, 2008 WL 413268
(C.D. Cal. Feb. 4, 2008) *superseded in part by statute* Pub. L. No. 110-241,
122 Stat. 1565 (June 3, 2008) 17

Lewis v. Casey,
518 U.S. 343 (1996) 7

Lopez v. KB Toys Retail, Inc.,
No. CV 07-144-JFW, 2007 U.S. Dist. LEXIS
82025 (C.D. Cal. July 17, 2007) 16, 17

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) ..... *passim*

Marbury v. Madison,
1 Cranch 137 (1803) 13

Murray v. GMAC Mortgage Corp.,
434 F.3d 948 (7th Cir. 2006) 6, 13, 20

Muskrat v. United States,
219 U.S. 346 (1911) 13

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 12, 18

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003) 22

Raines v. Byrd,
521 U.S. 811 (1996) 9

Safeco Ins. Co. of Am. v. Burr,
551 U.S. 47 (2007) 20

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.,
130 S. Ct. 1431 (2010) 22

Sierra Club v. Morton,
405 U.S. 727 (1972) 9

Steel Co. v. Citizens For A Better Environment,
523 U.S. 83 (1998) 10, 11

Summers v. Earth Island Inst.,
129 S. Ct. 1142 (2009) 7, 25

Taylor v. Acxiom Corp.,
No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010) 17, 18, 21

Trans Union LLC v. Federal Trade Comm'n,
536 U.S. 915 (2002) 20

Valley Forge Christian College v. Am. United For Separation of Church & State, Inc.,
454 U.S. 464 (1982) 8, 10, 12

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 10, 11, 18, 19

Warth v. Seldin,
422 U.S. 490 (1975) 7

White v. Experian Information Solutions, Inc., No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009) 14, 15, 23

CONSTITUTIONAL AUTHORITIES AND STATUTES

U.S. Const. Art. II 12

U.S. Const. Art. III ..... *passim*

12 U.S.C. § 2607 24

15 U.S.C. § 1681e 14

15 U.S.C. § 1681n 1, 5, 19

15 U.S.C. § 1681s 24

Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c) 4

Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) 4

Cable Piracy Act, 47 U.S.C. § 605(e) 4

Cable Privacy Act, 47 U.S.C. § 551(f) 4

Copyright Act, 17 U.S.C. § 504(c) 5

Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725 ..... 17, 18

Fair and Accurate Transactions Act, 15 U.S.C. § 1681c 16

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* 4

Fair Debt Collection Practices Act of 1978, 15 U.S.C. § 1692k(a) 5

Stored Communications Act of 1986, 18 U.S.C. § 2707(c) 5

Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b) 5

Truth in Lending Act of 1968,
15 U.S.C. § 1640(a) 5

Worker Adjustment and Retraining
Notification Act of 1988,
29 U.S.C. § 2104(a) 5

OTHER AUTHORITIES

Richard H. Fallon, Jr., Daniel J. Meltzer &
David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 153
(5th ed. 2003) 9

Henry J. Friendly, *Federal Jurisdiction: A General View* (1973) 21

Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*,
11 U. Pa. J. Const. L. 781 (2009)..... 12, 20, 22

Harold J. Krent & Ethan G. Shenkman,
Of Citizen Suits and Citizen Sunstein,
91 Mich. L. Rev. 1793 (1993)..... 12

Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*,
106 Colum. L. Rev. 1872, 1878 (2006) 22

John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219
(1993)..... 8

Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103 (2009)6, 17, 21, 22

INTEREST OF *AMICUS CURIAE*[1]

Experian Information Solutions, Inc., is a nationwide consumer reporting agency subject to regulation under the Fair Credit Reporting Act (FCRA). Like the Real Estate Settlement Procedures Act (RESPA), the FCRA includes a statutory damages provision, which plaintiffs have argued (and some courts have held) allows plaintiffs to sue for between $100 and $1000 per violation whether or not they suffered any actual harm. 15 U.S.C. § 1681n.

Consumer reporting agencies like Experian serve, essentially, as warehouses of consumer credit information. Experian maintains credit files on more than 200 million consumers, and, each day, answers 2 million credit inquiries and processes up to 50 million updates to its credit information database from lenders and other data furnishers.

As a nationwide consumer reporting agency, Experian is frequently subject to class action lawsuits by plaintiffs who have experienced no actual harm but seek class-wide statutory damages for alleged technical violations of the FCRA. Such suits are possible because the Act permits plaintiffs to sue for any willful departure from FCRA requirements "with respect to" a consumer, without expressly requiring that the consumer be injured by what may be a wholly technical violation. Indeed, it is not uncommon in these cases for significant numbers of

---

[1] All parties have consented in writing to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

class members to have actually *benefited* from the alleged violations. Due to the large number of credit files, updates, and inquiries Experian handles, these suits can involve millions of putative class members, and thereby threaten staggering liability.

Experian accordingly has a strong interest in the enforcement of constitutional restrictions on suits by plaintiffs who have suffered no actual injury. Decisions that allow such plaintiffs to bring statutory damages suits—in effect awarding them a bounty for suing over claimed legal violations that have caused them no injury—are inconsistent with the bedrock separation of powers concerns embodied in Article III.

SUMMARY OF THE ARGUMENT

A. Congress's authorization of a cause of action for statutory damages cannot confer Article III standing on plaintiffs who have suffered no injury in fact. Injury in fact is an essential component of Article III's case and controversy requirement that cannot be eliminated by statute. Congress can elevate a *de facto* injury to a legally cognizable injury, but it cannot authorize suit for a mere statutory violation that has no actual adverse effect on the plaintiff. Nor can it confer standing on a party who has suffered no actual injury by offering a bounty for bringing suit to enforce the law.

B. These limitations are essential to maintaining the separation of powers. Article III's injury-in-fact requirement ensures that bounty-hunting private litigants cannot extend the courts beyond their traditional and proper roles of redressing individual injuries, which would encroach on the Executive's duty to take care that the laws are faithfully executed and would risk arbitrary enforcement.

C. Congress has authorized statutory damages divorced from any showing of actual harm in numerous statutory schemes in addition to RESPA, creating the potential for lawyer-driven class actions for technical statutory violations that have caused no actual harm to the plaintiffs. Under the FCRA, for example, entrepreneurial lawyers, adopting an approach endorsed by the Ninth Circuit's decision below, have brought class actions on behalf of plaintiffs who not only have suffered no injury, but have even *benefited* from the alleged statutory violation. Nevertheless, these suits seek class-wide statutory damages in amounts that often exceed the net worth of the defendants.

D. Allowing plaintiffs to bring suits for statutory damages where they have suffered no actual injury would take courts far beyond their traditional and proper roles of vindicating rights and remedying injuries. Such suits function like roving private-attorney-general actions, by which private litigants hoping to receive a bounty seek out statutory violations and enlist courts into law enforcement functions constitutionally assigned to the Executive. And the targets of such suits are threatened with one of the very dangers Article III was designed to prevent: arbitrary enforcement at the whim of private bounty hunters, unconstrained by the legal and political checks that cabin the discretion of the Executive.

These dangers are exacerbated when no-harm statutory damages claims are brought as class actions. Aggregation of statutory damages claims can lead to massive potential liability unconnected to any actual injury suffered by the plaintiff class. The

potential for such windfalls drives entrepreneurial lawyers to target technical violations that result in the largest possible classes rather than violations that cause the most harm. And because the *in terrorem* effect of such staggering liability can force defendants to settle even when they have meritorious defenses, bounty-hunting plaintiffs need not even target actual statutory violations; so long as the violations are arguable, defendants will be forced to settle or risk bankruptcy.

E. Finally, there is little risk that statutes like the FCRA and RESPA would go unenforced if Article III's limits are observed. Both the FCRA and RESPA, like most statutory schemes that incorporate statutory damages, provide for enforcement by executive agencies. And private suits by plaintiffs who actually *have been* harmed—which are facilitated by the availability of attorneys' fees—will act as a deterrent to statutory violations.

ARGUMENT

The implications of the Court's decision in this case extend far beyond RESPA. Numerous other statutes, like the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, authorize statutory damages whose amount or range is fixed without regard to any actual injury suffered by the plaintiff.[2] While these schemes

---

[2] *See, e.g.*, Anti-Counterfeiting Consumer Protection Act of 1996, 15 U.S.C. §§ 1116(d), 1117(c) (between $1000 and $200,000 per counterfeit mark and up to $2 million for willful violation); Anti-Cybersquatting Consumer Protection Act of 1999, 15 U.S.C. § 1125(d) (between $1000 and $100,000 for each bad faith violation); Cable Piracy Act, 47 U.S.C. § 605(e) (between $1000 and $10,000 per violation, and between $10,000 and $100,000 per willful violation); Cable Privacy Act, 47 U.S.C.

may to some extent aim to facilitate litigation of claims involving damages that are small and/or difficult to quantify or prove, in practice these statutes frequently result in claims by plaintiffs who have not suffered the injury in fact that is a prerequisite for Article III standing.

Litigation under the FCRA provides a prime example. Unlike many statutes that expressly limit statutory damages to individuals *adversely affected* by the challenged conduct, *see, e.g.*, *Doe v. Chao*, 540 U.S. 614, 624 (2004), the FCRA on its face requires only a willful violation "with respect to any consumer"—with no express requirement that the consumer have been injured in any way by the alleged violation. In the event of such a violation, a consumer-plaintiff may recover "any actual damages . . . *or damages of not less than $100 and not more than $1000*," in addition to punitive damages and attorneys' fees. 15 U.S.C.

(continued)

§ 551(f)(2)(A) (greater of $100 per day of violation or $1000); Copyright Act, 17 U.S.C. § 504(c) (between $750 and $30,000 for each act up infringement and up to $150,000 for willful infringement); Fair Debt Collection Practices Act of 1978, 15 U.S.C. § 1692k(a) (up to $1000 per violation, with cap on class action recovery of $500,000 or 1% of defendant's net worth); Stored Communications Act of 1986, 18 U.S.C. § 2707(c) (minimum of $1000 per violation); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)(B) ($500 per violation, treble damages for willful violations); Truth in Lending Act of 1968, 15 U.S.C. § 1640(a)(2) (between $100 and $5000 per violation, with cap on class action recovery of $500,000 or 1% of defendant's net worth); Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2104(a)(3) ($500 per day of violation).

§ 1681n(a)(1)(A). Many plaintiffs have argued (and some courts have accepted) that this authorizes a cause of action for statutory damages without the need to show any actual injury. *See, e.g.*, *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 705-08 (6th Cir. 2009) (holding that consumer need not plead any injury stemming from alleged inaccuracy in her credit report where defendant systematically used wrong drivers license numbers in check verification system); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) (holding that plaintiff class could seek statutory damages for alleged improper access to their credit information "without proof of injury").

This ability to assert claims without a showing of individual injury—coupled with the fact that the challenged credit reporting procedures often apply to thousands or even millions of consumers—regularly gives rise to lawyer-driven class actions for alleged technical violations where the named plaintiffs and class members have suffered no actual harm. *See* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 & nn.78-80 (2009) (listing examples of lawyer-driven statutory damages suits). Indeed, not only are such suits regularly brought on behalf of classes of plaintiffs who have suffered no injury, but such claims are even brought on behalf of putative class members who have *benefited* from the alleged violations of FCRA requirements—such as consumers who seek damages for an alleged inaccuracy in their credit files that *raises* their credit scores.

Such plaintiffs are in the classic position of litigants without Article III standing, seeking judicial enforcement of legal requirements despite the absence of any actual injury to vindicate. Contrary to the Ninth Circuit, Congress's authorization of a statutory damages remedy in such cases cannot substitute for the bedrock requirement of injury in fact. For a plaintiff who suffers no injury from the violation of which he complains, statutory damages amount to nothing more than a windfall or bounty that cannot create a "Case[]" or "Controvers[y]" where one does not otherwise exist.

I. CONGRESS'S AUTHORIZATION OF STATUTORY DAMAGES CANNOT CONFER ARTICLE III STANDING ON PLAINTIFFS WHO HAVE SUFFERED NO INJURY IN FACT.

A. "[T]he requirement of injury in fact is the hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). As this Court has explained, the "actual injury" component of Article III's case or controversy requirement is necessary to maintain the separation of powers. *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 576-77 (1992). "This limitation 'is founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Summers*, 129 S. Ct. at 1148 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The role of courts is limited to vindicating the rights of individuals and "redress[ing] or prevent[ing] actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* Vindicating the broader *public* interest in seeing that the laws are obeyed is

the province of the political branches. *Lujan*, 504 U.S. at 576-77.

Thus the judicial power may only be invoked by a party who can show that he has been injured "in a concrete and personal way," ensuring the "vitality of the adversarial process" and that legal questions are answered, not in the abstract, "'but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.'" *Id.* at 581 (Kennedy, J., concurring) (quoting *Valley Forge Christian College v. Am. United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)). The judiciary's role in setting and enforcing legal rules is purely a by-product of its role in deciding cases. "[F]ederal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Allen v. Wright*, 468 U.S. 737, 752 (1984). "We accept the judiciary's displacement of the elected branches when necessary to decide an actual case," but in the absence of the need to remedy an individual's injury, the courts may not reach out to address alleged violations of the law. John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993).

The injury-in-fact requirement thus prevents the judicial power from turning into a roving commission to enforce compliance with all laws and regulations; it ensures that the judiciary will act only to the extent necessary to resolve actual disputes involving actual injuries. As a necessary corollary, Article III thus places "an outer limit [on] the power of Congress

to confer rights of action." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," but it cannot confer standing in the absence of an injury in fact. *Id.* at 578 (majority opinion); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1996) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 153 (5th ed. 2003).

To be sure, not all injuries cognizable for standing purposes must be pecuniary. Congress can create causes of action to redress noneconomic injuries. *See, e.g.*, *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998) (inability to obtain information necessary to evaluate candidates for public office); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (withholding of truthful information about availability of housing); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (lessened "aesthetic and recreational values" of wilderness). And Congress may appropriately provide for statutory damages when the amount of injury may be difficult to quantify or prove, as in the case of copyright infringement. *See, e.g.*, *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (explaining that statutory damages in Copyright Act of 1909 "give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits").

But in order for Congress to authorize a private party's invocation of the judicial power, there must be some "concrete, *de facto* injur[y]." *Lujan*, 504 U.S. at 578. A mere violation of a statute with respect to a particular individual—absent some actual adverse effect on that individual—is not an "injury" sufficient to confer Article III standing. *Cf. Chao*, 540 U.S. at 624 ("[T]he reference in §552a(g)(1)(D) [which creates a cause of action for statutory damages under the Privacy Act] to 'adverse effect' acts as a term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing, and who may consequently bring a civil action without suffering dismissal for want of standing to sue."). A plaintiff's interest in such a case is no different from the general public interest "in seeing that the law is obeyed," which this Court has repeatedly held is insufficient for a private litigant to invoke the judicial power. *E.g.*, *Akins*, 524 U.S. at 24; *Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 107 (1998); *Valley Forge*, 454 U.S. at 485. In creating a cause of action for a statutory violation, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

Similarly—and crucially, for purposes of this case and for statutes like the FCRA—Congress cannot manufacture standing in the absence of actual individual injury simply by offering a bounty to private plaintiffs for bringing suits to enforce the law. As the Court explained in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, while a bounty may give a plaintiff a concrete interest in the outcome of a suit, an "interest

unrelated to injury in fact is insufficient to give a plaintiff standing." 529 U.S. 765, 772 (2000); *see also Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 666 (7th Cir. 2001) (Posner, J.) ("[T]he Supreme Court appears to have limited the right to create a bounty system enforceable in federal courts to the situation in which the bounty deters the defendant from inflicting a future injury on the particular plaintiff bringing the suit, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000), unless the plaintiff can be viewed as a kind of assignee of the prospective victims, as suggested in *Vermont Agency*."). An interest, such as a bounty or an award of attorneys' fees, "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, 529 U.S. at 773; *see Steel Co.*, 523 U.S. at 107 ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the costs of bringing suit.").[3]

B. This limitation on Congress's ability to create a bounty system for enforcing the law is critical to maintaining the separation of powers. Congress cannot authorize roving private attorneys general to seek out violations of the law that have caused them no actual injury and prosecute them in court in the hopes of obtaining a bounty. *Lujan*, 504 U.S. at 576-77; *id.* at 580-81 (Kennedy, J., concurring). To do so

---

[3] The basis for the *qui tam* relator's standing in *Vermont Agency* was not his interest in the bounty he would receive if he prevailed in his False Claims Act suit, but rather the fact that he was suing as the partial assignee of the *Government's* damages claim. 529 U.S. at 773-74 & n.4.

would be "to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3." *Id.* at 577 (majority opinion); *see also* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009); Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793 (1993).

Article III's injury-in-fact requirement prevents private litigants from extending the role of the courts beyond their traditional and proper function. A private litigant may sue only the party whose conduct caused him injury and may seek redress only for that harm; he may not exercise the discretion of the Executive in "roam[ing] the country in search of" legal violations and deciding which to prosecute. *Valley Forge*, 454 U.S. at 487; *see* Grove, *supra* at 784, 808-09, 828.[4] And it limits courts to their

---

[4] If Congress were permitted to delegate the enforcement power that Article II assigns to the Executive branch—and its attendant prosecutorial discretion—to uninjured private parties tasked with seeking out violations of the law and bringing them to federal court in exchange for a bounty, there would be a serious risk of arbitrary enforcement. Grove, *supra* at 783-84, 807-08, 814-819. Private bounty hunters lack the political and legal constraints that cabin the Executive's prosecutorial discretion. *Id.* at 801, 815-19. And, critically, they lack any electoral accountability for their enforcement decisions. *Id.* at 817-18; Krent & Shenkman, *supra* at 1801-04, 1808-09. Thus private parties may have their own motives for bringing suit (*e.g.*, to target a competitor, an ideological opponent, or a particular ethnicity, or to maximize their bounty) irrespective of public importance of the suit, resulting in arbitrary, uneven enforcement or overenforcement of the law. Grove, *supra* at 816-17; Krent & Shenkman, *supra* at 1808-09; *see Nike, Inc. v.*

traditional and proper function—"decid[ing] on the rights of individuals" and remedying individual injuries. *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)). Congress can no more enlist the courts into the general enforcement of the laws than it can authorize them to offer advisory opinions. *Cf. Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. (Dall.) 409 (1792).

C. Interpreting statutory damages schemes as allowing private plaintiffs who have suffered no actual injury (or who may even have benefited) from an alleged legal violation to bring class actions for statutory damages—as the decision below would do—violates Article III and the separation of powers principles it embodies.

Recent litigation under the Fair Credit Reporting Act, highlights this problem. Under the interpretation of the FCRA pressed by many plaintiffs—and adopted by some courts, *see, e.g.*, *Beaudry*, 579 F.3d at 705-08; *Murray*, 434 F.3d at 953—creative lawyers can bring statutory damages class actions on behalf of consumers who not only have suffered no injury (*e.g.*, when the alleged violation results in no inaccuracies on a consumer's

---

(continued)

Kasky, 539 U.S. 654, 678-80 (2003) (Breyer, J., dissenting from dismissal of cert.) (observing that under California law, private parties may bring certain suits "even though they themselves have suffered no harm," and expressing concern that "such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks" on "public enforcement agencies").

credit report), but who have even *benefited* from the alleged violation (*e.g.*, when inaccuracies favor the consumer). Such suits are not just a theoretical possibility. They happen with some frequency.

For example, in *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009), the plaintiff class claimed that Experian and other credit reporting agencies had violated the FCRA's requirement to "follow reasonable procedures to assure maximum possible accuracy" of consumer credit reports, 15 U.S.C. § 1681e(b), by failing to report consumers' credit limits for their Capital One credit cards (information that Capital One refused to provide). The omission of credit-limit information hurt some consumers' credit scores, had no impact on certain others, and *increased* the credit scores of a very substantial third group. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 5. Despite the fact that he had actually benefited from the alleged violation, the named plaintiff sought to represent a class of over four million consumers, which, at $100 to $1000 per violation, sought aggregate statutory damages between $400 million and $4 billion.[5]

Likewise, in *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG (C.D. Cal. Jan. 26, 2009), the plaintiff claimed that Experian and the two other nationwide consumer reporting

---

[5] The court ultimately granted summary judgment for Experian on the ground that the omitted information did not violate the FCRA's accuracy and reasonable procedures requirements, but only after first certifying a class that *included* the consumers who benefited from the alleged violation. *Harris*, No. 6:06-cv-1808-GRA, slip op. at 8-12.

agencies, Trans Union and Equifax, violated the FCRA by failing to report that certain debts had been discharged in bankruptcy. The claimed error, however, had no impact on many debtors and actually improved the credit scores of many other debtors. *Id.* slip op. at 9. Nevertheless, the plaintiffs sought between hundreds of millions and billions of dollars in statutory damages on behalf of a class of nearly eight million consumers.[6]

Similarly, in *Geiger v. Consumerinfo.com, Inc.*, No. SACV11-455 JVS (C.D. Cal.), the plaintiff claims that an Experian affiliate violated FCRA disclosure requirements on three websites that offered promotional deals on credit reports when consumers signed up for trial memberships in a credit monitoring service. Even though the named plaintiff conceded that he was not deceived by any statements on the websites and, in fact, left the website he visited without signing up, paying any money, or entering any transaction with the defendant, he seeks to represent a class of "all visitors" to the three websites—which receive over 12,000 visits per day.

---

[6] In a "tentative" ruling, the district court refused to certify a nationwide class of consumers whose debts were discharged in bankruptcy but whose credit reports showed discharged debts as due and owing, noting "that serious constitutional issues are at issue in this case due to the requirement, under Article III of the U.S. Constitution, that each plaintiff 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief' in order to have standing to bring suit." *White*, No. 05-cv-1070-DOC-MLG, slip op. at 11. The case settled, however, before any definitive ruling.

Thus without claiming any injury in fact, the plaintiff seeks billions of dollars in statutory damages.[7]

Such no-harm statutory damages suits are not limited to the credit reporting industry. Numerous lawsuits were filed in the wake of the 2003 Fair and Accurate Credit Transactions Act (FACTA), which required retailers to redact the expiration date and all but the last five digits of a credit card number on all electronically printed receipts. 15 U.S.C. § 1681c(g). In many of these putative class actions the plaintiffs claimed no actual injury from the failure to redact, but nevertheless sought hundreds of millions or even billions of dollars in statutory damages—damages that, in many cases, exceeded the net worth of the defendants. In *Lopez v. KB Toys Retail, Inc.*, No. CV 07-144-JFW (CWx), 2007 U.S. Dist. LEXIS 82025, at *14-15 (C.D. Cal. July 17, 2007), for example, the plaintiff sought statutory damages between $290 million and $2.9 billion—the low end of which was more than 600% of the defendant's net worth—even though, as the court noted, the putative class members could not have been harmed by the inclusion of the first four (instead of last five) digits of their credit card numbers, as those digits merely identify the issuing bank—information which is properly included on a receipt. And in *Evans v. U-Haul Co. of California*, No. CV 07-2097-JFW, 2007 U.S. Dist. LEXIS 82026, at *14-17 (C.D. Cal. Aug. 14, 2007), the plaintiff sought between $115 million and $1.5 billion in statutory damages (compared to the defendant's net worth of

---

[7] The defendants' motion to dismiss on standing and other grounds is currently pending.

$118 million) for the defendant's inclusion of expiration dates on receipts, even though she admitted she suffered no harm from the practice. As the court noted: "In fact, Plaintiff was so unconcerned about identity theft that she attached the debit card and credit card receipts from Defendant's stores to her declaration without redacting the expiration date." *Id.* at *17.[8] *See generally* Scheuerman, *supra* at 104-06, 111-14, 134-35.

Likewise, in *Taylor v. Acxiom Corp.*, No. 2:07cv0001, 2008 U.S. Dist. LEXIS 115940 (E.D. Tex. Sept. 9, 2008), *aff'd*, 612 F.3d 325 (5th Cir. 2010), the plaintiffs sought a staggering $5 trillion in statutory damages for alleged violations of the Driver's Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721-2725, on behalf of a class of 20 million Texas drivers.

---

[8] Although the district court in both *Lopez* and *Evans* denied class certification in part because the staggering amount of statutory damages sought was wholly out of proportion to the harm alleged (*i.e.*, none), it is not clear that the district court would reach the same decision today in light of the Ninth Circuit's subsequent decision in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 721 (9th Cir. 2010), which held that a district court abused its discretion in failing to certify a FACTA credit-card receipt class on the ground that an aggregate statutory damages award of between $290 million and $2.9 billion would be out of proportion to any harm suffered. *See also Kesler v. Ikea U.S., Inc.*, No. SACV 07-568 JVS (RNBx), 2008 WL 413268, at *7 n.4 (C.D. Cal. Feb. 4, 2008) (noting, in certifying FACTA expiration-date class seeking statutory damages of $240 million to $2.4 billion, that risk of actual harm was "irrelevant"), *superseded in part by statute*, Pub. L. No. 110-241, 122 Stat. 1565 (June 3, 2008) (retroactively exempting expiration-date violations that occurred between December 4, 2004 and June 3, 2008 from FACTA willfulness liability).

Although they claimed that the defendants had violated the DPPA by obtaining the entire database of Texas driver information from the Texas Department of Public Safety (to avoid the need for piecemeal requests each time a defendant had a lawful need to access driver information), the plaintiffs did not claim any injury in fact—that is, they did not claim that any defendant used or disclosed their personal information for any impermissible purpose. *Id.* at *32.[9]

D. Statutory damages class actions of this type—where plaintiffs have suffered no injury, or worse, have actually benefited, from alleged violations—starkly present the precise dangers this Court has repeatedly warned against in its Article III standing cases.

A statutory damages scheme that allows plaintiffs to bring suit without the need to show any actual injury functions much like the bounty based private-attorney-general actions that Article III forbids. *See Vermont Agency*, 529 U.S. at 772-73; *Nike Inc. v. Kasky*, 539 U.S. 654, 661 (2003) (Stevens, J., concurring in dismissal of cert.) (plaintiff "proceeding as a private attorney general . . . does not have Article III standing"). While such statutory damages

---

[9] The district court dismissed for lack of Article III standing and for failure to state a claim. The Fifth Circuit affirmed the district court's determination that the plaintiffs failed to state a claim under the DPPA without expressly reaching the standing question. But it noted in dicta that the plaintiffs would have standing to challenge the bulk distribution of the entire Texas driver database despite the fact that they alleged no unlawful disclosure or use that might constitute a concrete injury. 612 F.3d at 340 n.15.

suits are not pure private-attorney-general actions in which any member of the general public can sue any defendant to enforce the law, eligible plaintiffs are not differentiated from the general public by any injury they have suffered. Under the FCRA, for example, the private right of action extends to statutory violations "with respect to any consumer." 15 U.S.C. § 1681n. But on the interpretation pressed by many plaintiffs (and accepted by some courts), an FCRA violation need not cause consumers any actual harm to be "with respect to" them.[10] *Cf. Chao*, 540 U.S. at 624 (noting that many statutory causes of action require "adverse effect," which is "term of art identifying a potential plaintiff who satisfies the injury-in-fact and causation requirements of Article III standing.").

Thus in no-harm statutory damages suits, as in a private-attorney-general scheme, the courts are impermissibly enlisted into hearing abstract claims of statutory violations unconnected to any concrete individual injury. The plaintiffs in such suits are not seeking to "obtain[] compensation for, or prevent[], the violation of a legally protected right," they seek only a bounty for prevailing in the litigation—little different from "a wager upon the outcome." *Vermont Agency*, 529 U.S. at 772-73. Indeed, in many FCRA

---

[10] Moreover, "with respect to any consumer" is not a meaningful limitation on suits against nationwide consumer reporting agencies like Experian. There is no meaningful distinction between a consumer reporting agency's practices "with respect to" consumers and the general public because consumer reporting agencies maintain files on just about everyone who engages in economic transactions in the United States.

cases, for example, the named plaintiffs will actually waive any claims for actual damages in an attempt to increase their chances of obtaining class certification on their statutory damages claims. *See, e.g.*, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 54 (2007) (claiming no actual harm); *Murray*, 434 F.3d at 952-53. Rather than litigate the alleged statutory violations in the context of the actual individual injuries they might cause, entrepreneurial class action lawyers deliberately seek to litigate their claims of statutory violations in the abstract in order to maximize their bounty.

Moreover, the targets of no-harm statutory damages suits are threatened with one of the very dangers Article III's injury-in-fact requirement is designed to prevent—arbitrary enforcement by private bounty hunters who lack any accountability and whose prosecutorial discretion is limited, not by any injury inflicted upon them, but only by the creativity of their claims. *See* Grove, *supra* at 784, 791, 807-09.

These dangers are exacerbated when no-harm statutory damages suits are brought as class actions. Aggregation of statutory damages claims in a class action can lead to staggering liability that can cripple or destroy businesses, even in the absence of any actual harm. For companies like Experian, for example, the FCRA's statutory damages of $100 to $1000 per violation can quickly add up to crushing liability, considering that Experian maintains credit files on over 200 million customers. *See Trans Union LLC v. Federal Trade Comm'n*, 536 U.S. 915, 917 (2002) (Kennedy, J., dissenting from denial of cert.) ("Because the FCRA provides for statutory damages

of between $100 and $1000 for each willful violation, petitioner [a nationwide consumer reporting agency,] faces potential liability approaching $190 billion."); Scheuerman, *supra* at 104. The potential for such enormous windfalls, drives entrepreneurial lawyers to seek out even arguable violations of the FCRA with respect to largest possible classes of consumers.

Faced with potential liability in the hundreds of millions or billions (or even trillions, *see Taylor*, 2008 U.S. Dist. LEXIS 115940) of dollars—liability that would cripple or destroy even large companies—defendants are put under tremendous pressure to settle, even when the class's claims are questionable and the defendants have meritorious defenses. This Court has often noted "the risk of '*in terrorem*' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (noting "intense pressure to settle"); Henry J. Friendly, *Federal Jurisdiction: A General View*, 120 (1973) (calling settlements induced by small probabilities of immense judgments in class actions "blackmail settlements"). And the risk of defendants being forced into unfair settlements is exacerbated in statutory damages class actions. As Justice Ginsburg recently explained: "When representative plaintiffs seek statutory damages, pressure to settle may be

heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting); *see also Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (aggregated statutory damages claims can produce "an *in terrorem* effect on defendants, which may induce unfair settlements"); *id.* at 29 (Newman, J. concurring) (same).[11]

Worse still, if the availability of statutory damages on an aggregated basis is decoupled from any actual injury suffered by the plaintiffs—as the decision below would allow—private enforcement of consumer protection statutes threatens to become arbitrary. *Cf.* Grove, *supra* at 808-09, 828. Entrepreneurial lawyers representing statutory damages classes will

---

[11] Further, because statutory damages schemes are typically intended "to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws" where damages are frequently small and difficult to quantify, when statutory damages claims are combined with the class action mechanism—also designed to facilitate litigation of low-value claims which there would otherwise be no incentive to bring—the resulting potentially enormous aggregate liability "distorts the purposes of both statutory damages and class actions." *Parker*, 331 F.3d at 22. The sort of double counting that results when claims for statutory damages, which are decoupled from actual harm precisely to enable individual litigation, are aggregated into a class action can distort Congress's underlying remedial scheme, resulting in both overenforcement and overdeterrence that is counterproductive to the overarching statutory goal. *See* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1878, 1885-87 (2006); Scheuerman, *supra* at 107-08, 111-15.

not seek out the defendants and violations that cause the most harm to consumers (as we would expect an accountable Executive Branch to do), but will instead have every incentive to seek out violations that maximize class size—and therefore the aggregated statutory damages bounty—regardless of whether the violations actually injure anyone (or, indeed, even benefit class members). *See, e.g.*, *Harris v. Experian Information Solutions, Inc.*, No. 6:06-cv-1808-GRA (D.S.C. June 30, 2009); *White v. Experian Information Solutions, Inc.*, No. 05-cv-1070-DOC-MLG, (C.D. Cal. Jan. 26, 2009); *Geiger v. Consumerinfo.com, Inc.*, No. SACV11-455 JVS (C.D. Cal.). And with the *in terrorem* effect of such massive potential damages, entrepreneurial lawyers need not even bring claims for *actual* violations; so long as the violation is arguable and the class large enough, defendants will be forced to settle or risk bankruptcy.

For these reasons, allowing plaintiffs to sue for statutory damages without the need to show any injury in fact—as the decision below does—would result in private suits that an accountable Executive would never consider bringing, either because of the absence of harm or merit. And such no-harm statutory damages suits would infringe on the Executive's power and duty to "take Care that the Laws be faithfully executed." *Lujan*, 504 U.S. at 577 (quoting Art. II, § 3). The result would be arbitrary and uneven enforcement—targeting the largest classes rather than the clearest or most harmful violations—and a role for the courts that goes well beyond the properly limited Article III function of adjudicating actual disputes involving actual injuries.

E. Finally, there is little worry that adhering to Article III's requirements and barring private actions by individuals who have suffered no actual injury will cause statutes like the FCRA and RESPA to go unenforced. Like many other statutory schemes that incorporate statutory damages, both the FCRA and RESPA provide for agency enforcement as well. *See* 15 U.S.C. § 1681s (providing for enforcement of FCRA by the Federal Trade Commission, other executive agencies, and state attorneys general); 12 U.S.C. § 2607(d)(1), (4) (providing for criminal penalties and civil enforcement of RESPA by Secretary of Housing and Urban Development or state attorneys general). Under the separation-of-powers principles embodied in the Constitution, enforcement by executive agencies—who are accountable to the public and whose prosecutorial discretion is cabined by legal and political checks—is the proper means for vindicating the public's interest in ensuring that the law is obeyed. *See Lujan*, 504 U.S. at 576-77; *see also In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 351 (N.D. Ill. 2002) ("[A]ny 'uninformed victims' who have suffered no actual economic damage, have been and continue to be protected by the FTC's enforcement of the [FCRA] and regulations."), *appeal dismissed sub nom, Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003).

Moreover, private suits by plaintiffs who *have* suffered actual injury will serve as a further deterrent to statutory violations—without the need to expand judicial authority beyond the limits set by Article III . *See, e.g., In re Trans Union*, 211 F.R.D. at 351 ("[T]he court concludes that regulation by the FTC, coupled with individual actions for damages (and attorney fees), is superior to a class action for

statutory damages by tens of millions of consumers who claim no actual economic loss."). And Congress can (and does with respect to both the FCRA and RESPA) make individual suits by plaintiffs with only small damages practicable by providing for an award of reasonable attorneys' fees to prevailing plaintiffs. Such suits advance statutory purposes without exceeding the courts' traditional and proper role of vindicating individual rights and remedying individual injuries. *See Summers*, 129 S. Ct. at 1148; *Lujan*, 504 U.S. at 576.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

MEIR FEDER
Counsel of Record
D. THEODORE RAVE
JONES DAY
222 East 41st Street
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

DANIEL J. MCLOON
JONES DAY
555 South Flower Street
50th Floor
Los Angeles, CA 90071
(213) 489-3939

Counsel for Amicus Curiae

August 26, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE FACEBOOK, INC., LINKEDIN CORP., YAHOO! INC., AND ZYNGA INC. IN SUPPORT OF PETITIONERS

FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-5000

PATRICK J. CAROME
Counsel of Record
SAMIR JAIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
patrick.carome@wilmerhale.com

Library of Congress
Law Library

QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

The question presented is:

In the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. ARTICLE III'S STANDING REQUIREMENTS ARE A CORNERSTONE OF OUR LEGAL SYSTEM 6

II. FEDERAL INFORMATION PRIVACY LAWS THAT PROVIDE FOR STATUTORY DAMAGES DO NOT ELIMINATE ARTICLE III'S INJURY-IN-FACT REQUIREMENT 9

A. Electronic Communications Privacy Act 11

1. Wiretap Act (18 U.S.C. §§ 2511–2522) 11

2. Stored Communications Act (18 U.S.C. §§ 2701–2712) 12

B. Fair and Accurate Credit Transactions Act (15 U.S.C. §§ 1681 et seq.) 13

III. ADHERENCE TO THIS COURT'S LONG-ESTABLISHED STANDING DOCTRINES IS ESSENTIAL TO MAINTAINING THE INTEGRITY OF OUR JUDICIAL SYSTEM AND PREVENTING PLAINTIFFS FROM MANIPULATING THE SYSTEM TO EXTORT SETTLEMENT PAYMENTS THROUGH NO-INJURY CLASS ACTIONS 14

TABLE OF CONTENTS—Continued

Page

IV. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH ARTICLE III AND MUST BE REVERSED 19

A. Congress May Create New Causes Of Action, But Only Where A Plaintiff Has Suffered Injury In Fact Does She Have Standing To Bring A Claim Using Congress's Newly-Created Cause Of Action 19

B. A Concrete And Particularized Injury Or Harm Is The *Sine Qua Non* Of Injury In Fact, But That Does Not Necessarily Preclude Article III Standing For A Plaintiff Who Suffers A Substantial Injury That Involves No Provable Monetary or Economic Loss 21

C. Several Lower Courts Have Erroneously Conflated Congress's Provision Of A Statutory Damages Remedy With The Constitutional Requirement Of Injury In Fact 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page(s)

AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 16

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007) 16

Claridge v. *RockYou, Inc.*, No. C09-6032, 2011 WL 1361588 (N.D. Cal. Apr. 11, 2011) 24

Cooper v. *FAA*, 622 F.3d 1016 (9th Cir. 2010) 26

DeMando v. *Morris*, 206 F.3d 1300 (9th Cir. 2000) 25

Doe v. *Chao*, 540 U.S. 614 (2004) 22, 26

Doe v. *National Board of Medical Examiners*, 199 F.3d 146 (3d Cir. 1999) 20

Dura Pharmaceuticals, Inc. v. *Broudo*, 544 U.S. 336 (2005) 16

Edwards v. *First American Corp.*, 610 F.3d 514 (9th Cir. 2010) 2, 20

Ehrich v. *I.C. Systems, Inc.*, 681 F. Supp. 2d 265 (E.D.N.Y. 2010) 25

Friends of Earth, Inc. v. *Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) 9

Gladstone Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 20, 21

In re Facebook Privacy Litigation, No. 10-02389, 2011 WL 2039995 (N.D. Cal. May 12, 2011) 2, 12, 24

TABLE OF AUTHORITIES—Continued

Page(s)

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 17

Joint Stock Society v. *UDV North America, Inc.*, 266 F.3d 164 (3d Cir. 2001) 20

Kendall v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009) 20

Lee v. *Chase Manhattan Bank*, No. 07-04732, 2008 WL 698482 (N.D. Cal. Mar. 14, 2008) 9

Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 19

Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

Martinez v. *Shinn*, 992 F.2d 997 (9th Cir. 1993) 25

People ex rel. Lockyer v. *Brar*, 9 Cal. Rptr. 3d 844 (Cal. Ct. App. 2004) 15

Pure Power Boot Camp, Inc. v. *Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417 (S.D.N.Y. 2010) 13

Raines v. *Byrd*, 521 U.S. 811 (1997) 6, 7

Ramirez v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161 (D. Kan. 2008) 2, 14

Robey v. *Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208 (10th Cir. 2006) 19, 25

Robins v. *Spokeo, Inc.*, No. 10-05306, 2011 WL 597867 (C.D. Cal. Jan. 27, 2011) 9

Specht v. *Netscape Communications Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Steel Co. v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) 7

Stop Youth Addiction, Inc. v. *Lucky Stores, Inc.*, 950 P.2d 1086 (Cal. 1998) 16

Summers v. *Earth Island Institute*, 129 S. Ct. 1142 (2009) 6, 7, 8, 21

Thompson v. *North Am. Stainless, LP*, 131 S. Ct. 863 (2011) 22

United States ex rel. Kreindler & Kreindler v. *United Techs Corp.*, 985 F.2d 1148 (2d Cir. 1993) 8

United States v. *Weiss*, 467 F.3d 1300 (11th Cir. 2006) 9

Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 7

Vermont Agency of Natural Resources v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 7

Warth v. *Seldin*, 422 U.S. 490, 501 (1975) 8, 20

Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 7

PLEADINGS IN DOCKETED CASES

Netscape Communications Corp. v. *Federal Insurance Co.*, Dkt. 5-1 (Complaint), No. 06-198 (N.D. Cal. Jan. 12, 2006) 24

TABLE OF AUTHORITIES—Continued

Page(s)

Specht v. *Netscape Communications Corp.*, Nos. 00-4871, et al., Dkt. 2 (Amended Complaint), *available at* 2000 WL 34500293 (S.D.N.Y. Aug. 3, 2000) 23

Specht v. *Netscape Commcn's Corp.*, Dkt. 47 (Order), Nos. 00-4871, et al. (S.D.N.Y. Apr. 9, 2003) 24

Specht v. *Netscape Communications Corp.*, Dkt. 67 (Stipulation of Settlement), Nos. 00-4871, et al., *available at* 2004 WL 5475796 (S.D.N.Y. Sept. 2, 2004) 23, 24

United States v. *Playdom, Inc.*, No. 11-00724 (Consent Order) (C.D. Cal. May 24, 2011), *available at* http://www.ftc.gov/os/caselist/1023036/110512playdomconsentorder.pdf 18

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III ..... *passim*

5 U.S.C. § 552a 26

12 U.S.C. § 2607 i

Expedited Funds Availability Act, 12 U.S.C. § 4010 10

Homeowners Protection Act, 12 U.S.C. § 4907 10

Truth in Lending Act, 15 U.S.C. § 1640 10

TABLE OF AUTHORITIES—Continued

Page(s)

Fair and Accurate Credit Transactions Act,
15 U.S.C. §§ 1681 *et seq.* 13
§ 1681c 13
§ 1681n 10, 13
§ 1681s 13

Equal Credit Opportunity Act,
15 U.S.C. § 1691e 10

Fair Debt Collection Practices Act,
15 U.S.C. § 1692k 10

Electronic Funds Transfer Act,
15 U.S.C. § 1693m 10

The Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 *et seq.* 11

Wiretap Act,
§§ 2511–2522 11
§ 2520 11

Stored Communications Act,
§§ 2701–2712 12
§ 2707 12

Video Privacy Protection Act,
18 U.S.C. § 2710 10

Driver's Privacy Protection Act,
18 U.S.C. § 2724 10

Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854 10

Telephone Consumer Protection Act,
47 U.S.C. § 227 10

47 U.S.C. § 230 1

TABLE OF AUTHORITIES—Continued

Page(s)

Cable Communications Privacy Act, 47 U.S.C. § 551 10

Pub. L. No. 110-241, 122 Stat. 1565 (2008) 14

Cal. Bus. & Prof. Code
§ 17200 15
§ 17204 15
§ 17500 15
§ 17535 15

MISCELLANEOUS

Butler, Henry N. & Jason S. Johnston, *Reforming State Consumer Protection Liability, An Economic Approach*, 2010 Colum. Bus. L. Rev. 1 (2010) 16

Friendly, Henry J., *Federal Jurisdiction: A General View* (1973) 17

In the Matter of Facebook, Inc. d/b/a Facebook.com, Assurance of Discontinuance (N.Y. Att'y Gen. Oct. 15, 2007), *available at* http://www.ag.ny.gov/media_center/2007/oct/Executed%20Facebook%20AOD.pdf 18

In the Matter of Google, Inc., Proposed Consent Agreement, FTC File No. 102 3136 (Mar. 30, 2011) 18

Letter from FTC to Albert Gidari, Esq. (Oct. 27, 2010), *available at* http://www.ftc.gov/os/closings/101027googleletter.pdf 19

INTEREST OF AMICI CURIAE[1]

Amici are technology companies providing services or products via the Internet to hundreds of millions of users. Facebook, Inc. is a social media service with more than 750 million users. LinkedIn Corp. is the world's largest professional network on the Internet with more than 120 million members. Yahoo! Inc., together with its consolidated subsidiaries, is a digital media company that delivers personalized digital content to vast global audiences and provides opportunities for advertisers to connect to their target audiences on Yahoo! properties and beyond, including through an extensive distribution network of affiliated sites or offerings. In April 2011, Yahoo! reached more than 187 million unique users. Zynga Inc. is a social gaming company with more than 200 million monthly active users.

Amici are at the forefront of technological development, and provide great societal value by capitalizing on new technologies to effectively deliver innovative and valuable services and products to people. The "extraordinary advance[s]" in the availability of educational, social, and intellectual resources provided by companies such as amici have been made possible by the "vibrant and competitive free market" in which they operate. 47 U.S.C. § 230. It is accordingly critically important to the continued development of this

---

[1] Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of amicus briefs in support of either party are on file with the Clerk.

robust industry, and by extension the United States economy, to ensure companies like amici can continue to innovate and offer new services and products unfettered by unjustified and burdensome litigation.

Due to the nature of their businesses, many of the activities in which amici engage are subject to a number of federal and state laws that contain statutory damages provisions similar to the provision contained in RESPA. Like RESPA, these laws afford individuals a private right of action for alleged violations, and, as an alternative to recovery for actual damages suffered by the plaintiff, provide for statutory damages in set amounts that may be awarded, in certain circumstances, to a plaintiff who succeeds in proving that the law was violated.

Also like RESPA, these other laws have at times been invoked by litigants, including putative class representatives, who have suffered no harm or injury whatsoever. In certain of these lawsuits, courts have ruled, like the Ninth Circuit below, that the mere allegation of a violation of one of these laws, and nothing more, suffices to confer constitutional standing on plaintiffs who allege no injury. *E.g.*, *In re Facebook Privacy Litig.*, No. 10-02389, 2011 WL 2039995, at *4 (N.D. Cal. May 12, 2011) ("The injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" (quoting *Edwards* v. *First Am. Corp.*, 610 F.3d 514 (9th Cir. 2010))); *Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161, 1166 (D. Kan. 2008) ("[Defendant's] lack of standing argument erroneously presumes that plaintiff must establish that the alleged [statutory] violation caused her to suffer some form of actual harm.").

The Ninth Circuit's erroneous ruling is of particular concern to amici because permitting these types of "no-injury" lawsuits (often class actions with great attendant expense and burden) to proceed beyond the threshold motion to dismiss stage could have significant negative impacts on amici due to the broad-scale nature of their operations. Many technology companies such as amici interact on a daily basis with millions of (mostly non-paying) users via the Internet through highly efficient and systematized mechanisms. The inherent nature of this class of businesses, which enables them to unlock the great powers of the Internet and deliver significant value to consumers, at the same time makes them especially vulnerable to the untoward consequences that the Ninth Circuit's misreading of Article III would engender.

Specifically, under the Ninth Circuit's ruling, if any of the millions of consumers who interact with one of these companies is willing (or can be enticed by a plaintiffs' attorney) to allege that a generalized practice or act of the company violated a law providing for statutory damages, she could launch a putative class action on behalf of herself and millions of other "similarly situated" users—and pursue a concomitant multi-*billion* dollar statutory damages claim—without herself or a single other class member having suffered any injury from the practice or act at issue. Allowing plaintiffs to file such no-injury class action lawsuits could subject businesses such as amici to damages demands that, at least on their face, would be potentially bankrupting. Just the threat of these massive damages claims create strong incentives to end even baseless suits with settlement payments, essentially rewarding plaintiffs (and their opportunistic counsel) for filing extortionate strike suits. While Internet businesses such as amici

would almost certainly have valid defenses on the merits to such lawsuits, if they were unable to eliminate these strike suits "at the courthouse door," the *in terrorem* effect of even a small chance of a devastating loss, as well as the prospect of significant litigation costs, would increase the likelihood of meritless suits being settled by monetary payments that benefit only plaintiffs' attorneys.[2]

Because of the similar standing questions presented in this case and in suits seeking statutory damages under various other laws to which amici may be subject, this Court's determination of respondent's standing to seek statutory damages under RESPA is of great importance to amici. The Court's decision in this case may affect the standing analysis to be applied in suits under such other laws, and therefore the ability of Internet enterprises to seek prompt dismissal of suits by plaintiffs who suffer no injury and seek statutory damages on behalf of millions of putative class members.

SUMMARY OF ARGUMENT

This Court's cases are clear that, although Congress has the power to create new legal rights and causes of action where none previously existed, Article III of the Constitution requires a plaintiff to have suf-

---

[2] In addition to merits-based defenses, companies such as amici also would likely have non-Article III procedural defenses to these types of lawsuits—for example, due process challenges to the availability of astronomical, compounded damages awards for a violation that injured no one, and unsuitability challenges to certification of a class where statutory damages and the availability of attorneys' fees for successful plaintiffs make individual actions superior to class actions.

fered injury in fact before she can avail herself of the federal courts. Congress's establishment of laws that contain statutory damages provisions does not change this fundamental separation of the legislative and judicial functions, and the Ninth Circuit's decision to the contrary cannot be reconciled with this Court's long-standing Article III jurisprudence.

Not only is this constitutional requirement of the utmost importance in maintaining the separation of powers, it also has practical significance in that it limits the availability of the federal courts to those who have at least a plausible claim to have suffered a concrete injury from an alleged legal violation. This requirement in turn ensures that federal laws protect those who are injured in fact and prevents these same laws from being used as a tool by opportunistic plaintiffs. While this Court's standing jurisprudence does not require that a plaintiff always have suffered a demonstrable *financial* loss to have injury in fact (nor do amici argue here that it should), Article III clearly requires that a plaintiff have suffered a concrete and individualized harm to have a cognizable case or controversy within the jurisdiction of the federal courts. This limitation is of particular interest to amici, who are potentially exposed due to the nature of their businesses to very large class action suits, claiming potentially enormous statutory damages for alleged technical violations. This Court should reaffirm that the constitutional standing limitations apply with equal force to laws providing for statutory damages, to ensure that amici and similarly situated businesses are not forced to settle meritless claims to avoid even the remote possibility of enormous damages awards.

ARGUMENT

I. ARTICLE III'S STANDING REQUIREMENTS ARE A CORNERSTONE OF OUR LEGAL SYSTEM

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997) (internal quotation marks and citation omitted). The doctrine of standing implements Article III's restriction on judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

The importance of the injury-in-fact requirement in our judicial system cannot be overstated. In addition to "preserv[ing] the vitality of the adversarial process" by ensuring that the parties to a case have an actual stake in the outcome, the requirement ensures that legal questions will be aired and resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action" and not "in the rarified atmosphere of a debating society." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). "In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government." *Id.*; *see also id.* at 576 (Opinion of the Court) (principle of injury in fact is "fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that

are the business of the courts rather than of the political branches").

The "irreducible constitutional minimum of standing" consists of three elements: (1) injury in fact; (2) causation; and (3) redressability. *See Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103–104 (1998). To demonstrate an "injury in fact," a party must allege "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990)); *see also Steel Co.*, 523 U.S. at 103–104. The test for an injury in fact "requires more than an injury to a cognizable interest . . . [i]t requires that the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563 (internal quotation marks omitted).

Congress, through its legislative powers, may create a new cause of action and allow for a private right of action to enforce it in the courts. *See, e.g., Vermont Agency of Natural Res.*, 529 U.S. at 773. But the fact that Congress may create new causes of action or legal rights does not mean that the injury requirement of standing has been eliminated. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 129 S. Ct. at 1151; *see also Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under

Art. III."); *Lujan*, 504 U.S. at 580–581 (Kennedy, J., concurring in part and concurring in judgment) ("[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.... [T]he party bringing suit must show that the action injures him in a concrete and personal way.").

Thus, as this Court stated in *Warth* v. *Seldin*, even where Congress creates a new cause of action, "[o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." 422 U.S. 490, 501 (1975). The legislative branch cannot manufacture an injury, nor eliminate the need for a litigant to show some individualized harm. Rather, in enacting a new cause of action, Congress is "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578. As numerous cases have held, even where a statutory violation exists a party must show some concrete and particularized injury to him or herself. *See, e.g.*, *Summers*, 129 S. Ct. at 1149 ("Here, respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above." (emphasis in original)); *United States ex rel. Kreindler & Kreindler* v. *United Techs Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Nevertheless, some injury-in-fact must be shown to satisfy constitutional require-

ments, for Congress cannot waive the constitutional minimum of injury-in-fact.").[3]

II. FEDERAL INFORMATION PRIVACY LAWS THAT PROVIDE FOR STATUTORY DAMAGES DO NOT ELIMINATE ARTICLE III'S INJURY-IN-FACT REQUIREMENT

Amici are leading members of a rapidly developing industry that provides a myriad of services and products to hundreds of millions of users via the Internet. In order to benefit from these businesses' products and services, users often provide certain personal identifying information, such as their names, addresses, and e-mail addresses. The Internet industry's products and services often also operate as a platform for users to communicate with providers and among themselves and to share additional personal identifying information with one another, as well as to conduct financial trans-

---

[3] *See also United States* v. *Weiss*, 467 F.3d 1300, 1310–1311 (11th Cir. 2006) ("While it is true that Congress may enact statutes creating legal rights ... [a] federal court's jurisdiction ... can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action[.]" (internal citations and quotation marks omitted) (alteration and second ellipses in original)); *Friends of Earth, Inc.* v. *Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–157 (4th Cir. 2000) (standing exists where plaintiff "brings this suit to vindicate his private interests in his and his family's well-being—not some ethereal public interest"); *Robins* v. *Spokeo, Inc.*, No. 10-05306, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) (allegation of statutory violation insufficient to confer standing without allegation of "actual or imminent" harm); *Lee* v. *Chase Manhattan Bank*, No. 07-04732, 2008 WL 698482, at *5 (N.D. Cal. Mar. 14, 2008) ("[T]he mere allegation of a violation of a California statutory right, without more, does not confer Article III standing. A plaintiff invoking federal jurisdiction must also allege some actual or imminent injury resulting from the violation[.]" (citing *Lujan*, 504 U.S. at 560–561)).

actions and purchases, which may involve the transmission of still more information such as credit card or other payment information.

With the purpose of protecting personal privacy interests, Congress has enacted laws that, in some contexts, regulate the acquisition, use, and disclosure of certain information by companies, such as amici, who receive or store that information. Some of these information privacy laws contain, in addition to substantive provisions, private rights of action permitting certain individuals to bring suit against defendants (who may include companies like amici) alleged to have violated the laws. In connection with these private causes of action, these laws establish statutory damages amounts that may be awarded to prevailing plaintiffs, and may also provide for punitive damages and attorneys' fees and costs. Several such laws are described below.[4]

---

[4] Amici focus on these information privacy laws because of their potential applicability to entities within the Internet industry. There are a host of other laws raising this same issue—statutes containing a private right of action and a statutory damages remedy, some of which courts have found to confer standing even where an alleged statutory violation did not result in any injury to the plaintiff. *See, e.g.*, Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3); Video Privacy Protection Act, 18 U.S.C. § 2710(c)(1); Cable Communications Privacy Act, 47 U.S.C. § 551(f)(1); Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1); Truth in Lending Act, 15 U.S.C. § 1640(a)(1); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(1), (2)(A); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(a), (c); Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a)(2); Expedited Funds Availability Act, 12 U.S.C. § 4010(a)(2); Homeowners Protection Act, 12 U.S.C. § 4907(a)(1); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(a); Driver's Privacy Protection Act, 18 U.S.C. § 2724(a).

A. Electronic Communications Privacy Act

The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 *et seq.*, protects the contents of wire, oral, and electronic communications while those communications are being made, are in transit, and are in certain forms of storage on computers. It also protects certain other information about those communications and their senders and recipients. Title I of ECPA amended the preexisting Wiretap Act, and Title II created what is referred to as the Stored Communications Act.

1. Wiretap Act (18 U.S.C. §§ 2511–2522)

The Wiretap Act, with certain exceptions, subjects to criminal and civil fines and penalties, including imprisonment, any person who intentionally intercepts, discloses, or uses the contents of any wire, oral, or electronic communication in violation of the Act. In addition to its criminal and civil enforcement provisions, the Wiretap Act authorizes "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the Act to recover "such relief as may be appropriate" from the purported violator of the Act. 18 U.S.C. § 2520(a).

The Wiretap Act also authorizes, in some circumstances, awards of statutory damages to successful private litigants. For the types of actions to which enterprises such as amici could be subject, the potential damages are set as the greater of: "(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000." 18 U.S.C. § 2520(c)(2).

2. Stored Communications Act (18 U.S.C. §§ 2701–2712)

The Stored Communications Act (SCA) protects the privacy of the contents of electronic communications stored by some types of service providers and of other information and records such service providers may hold about a subscriber, such as billing records or IP addresses. It restricts the circumstances in which such information may be disclosed to law enforcement or other government authorities and, in the case of contents of communications, to other private parties.

The SCA also affords a private right of action to any "provider of electronic communication service, subscriber, or other person aggrieved" by a knowing or intentional violation of the law. 18 U.S.C. § 2707(a). The damages that may be available in a private action under the SCA are established by the statute as "the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000." *Id.* § 2707(c). The SCA also allows for recoupment of attorneys' fees and costs. *Id.* §§ 2707(b)(3), 2707(c).

As with RESPA, some courts have interpreted both the Wiretap Act and SCA to confer standing on a class action plaintiff based on the bare allegation that the defendant has violated the statute, regardless of whether the named plaintiff or any member of the class has alleged or could allege any harm resulting from the alleged violation. *See, e.g.*, *In re Facebook Privacy Litig.*, No. 10-02389, 2011 WL 2039995, at *4 (N.D. Cal. May 12, 2011) (finding plaintiffs established standing under Article III by alleging statutory violation despite lack of injury in fact, but dismissing case on grounds

that allegations did not state a claim under ECPA); *cf. Pure Power Boot Camp, Inc.* v. *Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 428 (S.D.N.Y. 2010) (finding, where plaintiffs expressly waived any claim of actual damages or "harm" under SCA, they were nonetheless entitled to statutory damages for SCA violations).

B. Fair and Accurate Credit Transactions Act (15 U.S.C. §§ 1681 *et seq.*)

The Fair and Accurate Credit Transactions Act (FACTA) is an amendment to the Fair Credit Reporting Act (which requires credit-reporting agencies and companies that use credit reports to comply with various procedures to protect consumers) that requires, among other things, that persons accepting credit or debit cards omit the expiration date and all but the last five digits of a customer's credit card number on receipts. 15 U.S.C. § 1681c(g). In addition to authorizing enforcement of the statute by federal and state regulators including the Federal Trade Commission (*id.* § 1681s), the statute also provides for civil liability for willful noncompliance with the requirements of the statute.

The civil liability provision sets damages as "any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). The statute also allows a court to award punitive damages, attorneys' fees, and costs to a prevailing plaintiff. *Id.* § 1681n(a)(2).

Like RESPA, the Wiretap Act, and the SCA, some courts have interpreted the allegation of a FACTA violation, without any separate allegation of actual injury

resulting from the alleged violation, as sufficient to confer standing to sue under FACTA. *See Ramirez* v. *Midwest Airlines, Inc.*, 537 F. Supp. 2d 1161 (D. Kan. 2008).[5]

III. ADHERENCE TO THIS COURT'S LONG-ESTABLISHED STANDING DOCTRINES IS ESSENTIAL TO MAINTAINING THE INTEGRITY OF OUR JUDICIAL SYSTEM AND PREVENTING PLAINTIFFS FROM MANIPULATING THE SYSTEM TO EXTORT SETTLEMENT PAYMENTS THROUGH NO-INJURY CLASS ACTIONS

The Wiretap Act, the SCA, FACTA, and other statutes that, like RESPA, provide a private right of action with a statutory damages remedy exist to protect the rights of individuals, including, where applicable, amici's users. These statutes do not, however, exist to allow for opportunistic strike suits by plaintiffs (and class action plaintiffs' attorneys) who allege viola-

---

[5] When FACTA was first enacted, "[a]lmost immediately after the deadline for compliance passed, hundreds of lawsuits were filed alleging that the failure to remove the expiration date was a willful violation of the Fair Credit Reporting Act even where the account number was properly truncated." Pub. L. No. 110-241, § 2, 122 Stat. 1565, 1565 (2008). In response to this deluge of lawsuits, Congress made findings that "[n]one of these lawsuits contained an allegation of harm to any consumer's identity" and that these lawsuits "represent[ed] a significant burden on the hundreds of companies that have been sued." It further found that an amendment clarifying that inclusion of an expiration date on a receipt from 2004 to 2008 did not violate the Act was necessary "to ensure that consumers suffering from any *actual harm* to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers." *Id.*, 122 Stat. 1566 (emphasis added). The amendment did not, however, have any effect on violations occurring after 2008.

tions of law without ever suffering any actual injury from the alleged violations. The requirements to state a claim under these statutes are in *addition* to the baseline standing requirements of Article III—they do not replace Article III's "irreducible constitutional minimum."

And for good reason: permitting a lawsuit to proceed where the plaintiff has suffered no concrete, particularized, individual injury gives plaintiffs and their attorneys license to use the class action mechanism to attempt to "enforce" claimed widespread violations of law. Allowing plaintiffs to act as roving attorneys general, however, is precisely what the Article III standing requirements are meant to avoid—and the injury-in-fact requirement exists to prevent. *See Lujan*, 504 U.S. at 573 (rejecting lower court's holding that "the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self contained, noninstrumental 'right' to have the Executive observe the procedures required by law") (emphasis in original).[6]

---

[6] California's Unfair Competition Law and False Advertising Law provide instructive examples of the perils of permitting no-injury suits to proceed. Cal. Bus. & Prof. Code §§ 17200, 17500. Until 2004, these laws authorized individuals acting on behalf of the general public to sue for relief from unfair competition in state court, regardless of whether they had in fact been injured—or were even affected—by the alleged unfair competition. *See People ex rel. Lockyer* v. *Brar*, 9 Cal. Rptr. 3d 844 (Cal. Ct. App. 2004), describing a typical scheme under the pre-2004 versions of these laws:

> Attorneys form a front "watchdog" or "consumer" organization. They scour public records on the Internet for what are often ridiculously minor violations of some

The ability to quickly resolve no-injury class actions through challenges to standing—which in turn will deter the plaintiffs' bar from filing such suits in the first place—is important to avoiding the enormous litigation costs and settlement pressures that accompany these cases, as this Court has repeatedly recognized. *See, e.g.*, *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting that where confronted with "even a small chance of a devastating loss," litigants will face "pressure[]" to compromise even "questionable claims"); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) (noting expenses of litigation "will push cost-conscious defendants to settle even anemic cases"); *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005) (noting need for sufficient allegations at pleading stage

---

> regulation or law by a small business, and sue that business in the name of the front organization. Since even frivolous lawsuits can have economic nuisance value, the attorneys then contact the business – and point out that a quick settlement (usually around a few thousand dollars) would be in the business's long-term interest.

Id. at 845; *see also Stop Youth Addiction, Inc.* v. *Lucky Stores, Inc.*, 950 P.2d 1086 (Cal. 1998). In response to widespread abuses of these statutes' permissive approach to standing, and the proliferation of frivolous lawsuits benefitting only the plaintiffs' class action bar, in 2004 the California electorate sponsored and enacted Proposition 64, a ballot initiative that amended these statutes to impose a standing requirement that restricts the ability to bring suit to an individual who has "suffered injury in fact and has lost money or property" (Cal. Bus. & Prof. Code §§ 17204, 17535). *See generally* Butler & Johnston, *Reforming State Consumer Protection Liability, An Economic Approach*, 2010 Colum. Bus. L. Rev. 1 (2010) (discussing negative economic consequences and harm to consumers that result from overbroad state consumer protection laws, including abuse of California's unfair competition law before enactment of Proposition 64).

to prevent plaintiff with "a largely groundless claim" from being allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" (internal quotation marks omitted)); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("[S]ettlements induced by a small probability of an immense judgment in a class action [have been called] 'blackmail settlements.'" (quoting Friendly, *Federal Jurisdiction: A General View* 120 (1973))).

The cost of the Ninth Circuit's contrary rule could be extremely high for amici and those similarly situated. These companies could be subjected to huge damages demands in a statutory damages lawsuit because of the very large numbers of users who typically obtain free services and products from amici, rendering even a seemingly token statutory damages figure of $500 or $1,000 enormous when applied to each member of a several-million-strong class. As noted, Facebook, for example, has over 750 million users. Under the Ninth Circuit's ruling, a class action purporting to join just one percent of its users (*i.e.*, 7.5 million) alleging a claim providing statutory damages of $1,000 could give rise to a potential claim of $7.5 *billion*, even if none of those users suffered any injury at all and, to the contrary, enjoyed substantial benefits from using the free service.[7]

This is not to say that any true violations of these laws will go unchecked. Where Congress determines

---

[7] These statutes also nearly always provide for prevailing party attorneys' fees, adding millions to the potential costs to Internet businesses of the Ninth Circuit's decision, on top of the millions they would be forced to expend on their own costs of defense.

that actual and widespread violations of statutes should be addressed notwithstanding the absence of any actual injury to consumers, it can provide for regulatory and even criminal enforcement. Indeed, RESPA, the Wiretap Act, and the SCA each contain, in addition to private rights of action, provisions for regulatory enforcement of these laws up to and including criminal penalties. Regulatory or criminal enforcement provide a superior mechanism for policing compliance with law without creating the extortionate effects of no-injury class actions.

In fact, federal and state regulatory and law enforcement agencies already actively scrutinize Internet and technology companies' (like amici's) compliance with laws such as the Wiretap Act and SCA, as well as other laws that do not contain private rights of action, further lessening any need for roving private attorneys general. *See, e.g.*, *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Mar. 30, 2011) (proposed consent agreement between Federal Trade Commission and Google, Inc. in connection with alleged privacy violations stemming from Google's "Buzz" social networking product); *In the Matter of Facebook, Inc. d/b/a Facebook.com* (Oct. 15, 2007), *available at* http://www.ag.ny.gov/media_center/2007/oct/Executed%20Facebook%20AOD.pdf (Assurance of Discontinuance entered between Facebook and New York Attorney General relating to handling of complaints and reports related to pornographic, harassing, or abusive content); *United States* v. *Playdom, Inc.*, No. 11-00724 (C.D. Cal. May 24, 2011), *available at* http://www.ftc.gov/os/caselist/1023036/110512playdomconsentorder.pdf (consent de-

cree relating to collection and disclosure of minors' personal information by online gaming companies).[8]

IV. The Ninth Circuit's Decision Is Inconsistent With Article III And Must Be Reversed

The Ninth Circuit's holding that the violation of a statutorily-protected right that causes no injury to the plaintiff constitutes an injury in fact for purposes of Article III cannot be squared with this Court's interpretation of Article III and the requirement of concrete, particularized injury that is a prerequisite to suit.

A. Congress May Create New Causes Of Action, But Only Where A Plaintiff Has Suffered Injury In Fact Does She Have Standing To Bring A Claim Using Congress's Newly-Created Cause Of Action

As discussed *supra* at 7–9 and in Petitioners' Brief at 20–24, Congress may create a cause of action, but only an actual injury can create a case or controversy within the meaning of Article III. In arriving at the contrary conclusion, the Ninth Circuit below and other courts interpreting RESPA and analogous laws have relied heavily on a statement in this Court's cases that "Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute." *See, e.g.*, *Robey* v. *Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006) (quoting *Linda R.S.*

---

[8] *See also* Letter from FTC to Albert Gidari, Esq. (Oct. 27, 2010), *available at* http://www.ftc.gov/os/closings/101027googleletter.pdf (discussing Federal Trade Commission investigation into Google's collection of data about consumers' wireless network access points and determination not to pursue regulatory action).

v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)); *Edwards* v. *First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010) (quoting *Warth*, 422 U.S. at 500). But as this Court made clear in *Lujan* and several subsequent decisions, this principle "involve[s] Congress' elevating to the status of legally cognizable injuries *concrete, de facto injuries* that were previously inadequate in law." 504 U.S. at 578 (emphasis added).

Accordingly, Congress cannot legislate for judicial recovery without injury—all Congress can do is create a cause of action that confers legal recognition on an injury in fact. *See Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to himself, that is likely to be redressed if the requested relief is granted." (internal quotation marks omitted, emphasis added)).[9] The Court should correct any misconception by the lower courts that the ability of Congress to define new legal rights equates to a repudiation of its categorical statements that "[i]n no event ... may Congress abrogate the Art. III minima."

---

[9] *See also Kendall* v. *Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) ("While plan fiduciaries have a statutory duty to comply with ERISA," the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement."); *Joint Stock Soc'y* v. *UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs lacked standing for violations of the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus could not show the required "injury in fact"); *Doe* v. *National Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.").

Gladstone, 441 U.S. at 100; *see also Summers*, 129 S. Ct. at 1151 ("[I]njury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

B. A Concrete And Particularized Injury Or Harm Is The *Sine Qua Non* Of Injury In Fact, But That Does Not Necessarily Preclude Article III Standing For A Plaintiff Who Suffers A Substantial Injury That Involves No Provable Monetary or Economic Loss

Amici are not contending here that plaintiffs claiming statutory violations must always allege a provable economic injury to maintain standing as a constitutional matter. But the plaintiff must allege a substantial and palpable injury of some sort—whether economic or otherwise—that is cognizable under Article III—*i.e.*, concrete, particularized, and redressable. *E.g.*, *Gladstone*, 441 U.S. at 113–115 (plaintiffs alleging denial of benefits of interracial association and racially integrated housing have standing).

For example, an inadvertent disclosure in violation of the SCA of the contents of an exchange of emails between two individuals that reveals their previously secret adulterous love affair to their family, friends, and colleagues may not cause any demonstrable economic or monetary injury to either of the parties to the exchange. But depending on the content and context, one or both of the exchange's participants might be able to plausibly allege a sufficiently concrete, redressable, and particularized injury—going beyond merely conclusory assertions of a generalized sense of embarrassment or

some other vague emotional impact—so as to satisfy Article III's actual injury requirement.[10]

In contrast, *Specht* v. *Netscape Communications Corp.*, a relatively early ECPA case against an Internet company that was litigated without the Article III standing issue being explicitly confronted or decided, provides a good example of plaintiffs' misuse of the federal courts, purportedly in pursuit of *billions* of dollars in claimed statutory damages, in the absence of any actual injury (economic or otherwise). 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

---

[10] Notably, even if this hypothetical disclosure is treated as having caused an actual injury sufficient to satisfy the constitutional minimum, there may well be distinct statutory standing requirements that must also be met. For example, unlike RESPA, some of the other statutory damages laws discussed in this brief explicitly limit private rights of action to persons who are "aggrieved" or "adversely affected" by the violation, thus further restricting the availability of judicial relief. *See Thompson* v. *North Am. Stainless, LP*, 131 S. Ct. 863, 869–870 (2011) (interpreting "aggrieved" to impose prudential standing requirement over and above the Article III minima). Moreover, even if a concrete injury to a particular plaintiff is sufficient to establish her own standing, that does not mean that other persons whose different communications or information may have been disclosed, even if the disclosure stemmed from the same challenged act or practice, also have standing, either individually or as members of a class. Rather, whether any such other persons have standing to sue would depend on a fact-specific, case-by-case analysis of each of their own alleged injuries (if any). And of course, even if a plaintiff had standing to bring suit, whether the conduct that caused the hypothetical disclosure constituted a violation of the SCA (or any other law) would involve a host of separate considerations not addressed here. *See Doe* v. *Chao*, 540 U.S. 614, 624–625 (2004) (noting that a plaintiff with standing to sue may have "injury enough to open the courthouse door, but without more ha[ve] no cause of action for damages").

The plaintiffs in *Specht*, on behalf of themselves and a putative national class of many millions of users of a Netscape software product called SmartDownload, claimed that the software's automatic transmission to Netscape of the Internet addresses of certain types of electronic files, as those files were being downloaded from third-party websites to the users' computers, constituted an unlawful "interception" of the users' electronic communications in violation of ECPA. *Id.* at 587 (describing allegations in complaint). But none of the *Specht* plaintiffs alleged any particular or concrete injury of any sort (and in fact nothing ever happened to any of the transmitted information aside from its temporary storage in disaggregated and unusable form on an internal Netscape server). *Specht* v. *Netscape Commc'ns Corp.*, Dkt. 67, Nos. 00-4871, et al., *available at* 2004 WL 5475796, ¶¶ F, N, Q (S.D.N.Y. Sept. 2, 2004) (*Specht* Stipulation of Settlement).

In those circumstances, the *Specht* case rightfully should have been dismissed at the outset due to lack of standing. Yet, for several years, the case wended its way through federal court with class counsel all the while claiming an entitlement to recover statutory damages of $10,000 apiece not only for each of the named plaintiffs, but also for each of the many millions of supposedly identically situated putative class members. *See, e.g.*, *Specht* v. *Netscape Commc'ns Corp.*, Nos. 00-4871, et al., Dkt. 2, *available at* 2000 WL 34500293, ¶¶ 13, 41–54 (S.D.N.Y. Aug. 3, 2000) (Amended Complaint). All told, the litigation cost Netscape several million dollars in discovery and other de-

fense costs[11] before resulting in a class-wide settlement in which plaintiffs and their counsel obtained no money. *Specht* Stipulation of Settlement ¶¶ F, N, Q. The correct, and far preferable, result would have been for the case to be dismissed at the outset due to lack of Article III standing.[12]

C. Several Lower Courts Have Erroneously Conflated Congress's Provision Of A Statutory Damages Remedy With The Constitutional Requirement Of Injury In Fact

Several cases interpreting standing requirements in the context of laws providing for statutory damages have concluded, like the Ninth Circuit, that no allegation of injury is needed—or that only a conclusory allegation of some generalized harm is sufficient—to bring suit under these statutes. *See, e.g.*, *In re Facebook Privacy Litig.*, 2011 WL 2039995, at *4 (finding plaintiffs established standing under Article III by alleging statutory violation despite lack of injury in fact); *Claridge* v. *RockYou, Inc.*, No. C09-6032, 2011 WL

---

[11] *Netscape Commcn's Corp.* v. *Federal Ins. Co.*, Dkt. 5-1 ¶ 33, No. 06-198 (N.D. Cal. Jan. 12, 2006) (Complaint) (Netscape incurred over $4 million in attorneys' fees and costs from commencement of the *Specht* litigation through settlement).

[12] During the *Specht* litigation, Netscape advanced a number of merits defenses to the ECPA claim. The district court ruled some of those defenses were insufficient to require dismissal on the face of the pleadings, but indicated a willingness to revisit them after discovery. *Specht* v. *Netscape Commcn's Corp.*, Dkt. 47, Nos. 00-4871, et al. (S.D.N.Y. Apr. 9, 2003). Ultimately, the district court never decided the merits of the ECPA claim. In the settlement agreement approved by the district court, Netscape explicitly denied that the conduct at issue violated ECPA. *Specht* Stipulation of Settlement ¶¶ F, N, Q.

1361588, at *4–5 (N.D. Cal. Apr. 11, 2011) (concluding that plaintiff may have adequately alleged standing under SCA where plaintiff argued that alleged data-privacy breach injured plaintiff by diminishing the value of that personal information); *DeMando* v. *Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000) (standing to assert Truth in Lending Act Violation conferred by "loss of a statutory right to disclosure").

Many of these cases appear to arrive at this erroneous conclusion by conflating the provision in these statutes for relief without proving actual *monetary damages* with the constitutional requirement to show actual *injury* to establish standing. *E.g.*, *Robey*, 434 F.3d at 1213 ("Because [plaintiff] is claiming that defendants violated the FDCPA by attempting to collect attorney's fees that were not permitted under Oklahoma law ... [he] has been injured under the terms of the FDCPA and can seek legal redress of his claims under that act. He has thus satisfied the 'injury in fact' and other requirements of constitutional standing."). These cases incorrectly reason that because the statutes do not require a plaintiff to have suffered an actual monetary loss to receive damages if the suit is successful, the statutes also do not require any claim of harm aside from a violation of the statute to establish standing.

This approach, however, erroneously equates the method by which damages awards may be calculated under these statutes with the requirement of injury in fact. *E.g.*, *Martinez* v. *Shinn*, 992 F.2d 997, 999 (9th Cir. 1993) ("The civil remedy was provided not only to compensate injuries, but also to promote enforcement of the Act and deter violations" (internal quotation marks omitted)); *Ehrich* v. *I.C. Sys., Inc.*, 681 F. Supp. 2d 265, 269–270 (E.D.N.Y. 2010) ("Specifically, the

FDCPA allows a plaintiff to recover statutory damages despite the absence of actual damages; in other words, the 'injury in fact' analysis is directly linked to the question of whether plaintiff has suffered a cognizable statutory injury and not whether a plaintiff has suffered actual damages."). Yet, for the reasons discussed above, the fact that these statutes may not require a plaintiff to prove a demonstrable monetary loss to be eligible for statutory damages,[13] does not mean that plaintiffs can have Article III standing to bring suit under these statutes without suffering actual injury.

To the extent lower court decisions addressing the question presented in this case have incorrectly answered the question due to the confusion engendered by statutory damages provisions, this Court should in this case correct that confusion and clarify that a plaintiff's standing to sue bears no relation to the potential availability of a predetermined statutory damage amount upon the conclusion of the putative lawsuit.

---

[13] *But see Chao*, 540 U.S. at 624–625 (construing Privacy Act to allow award of statutory damages only where plaintiff proves "actual damages" within the meaning of 5 U.S.C. § 552a(g)(4)(A)); *Cooper* v. *FAA*, 622 F.3d 1016 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3494, 3705, 3710 (U.S. June 20, 2011) (No. 10-1024) (presenting question whether mental or emotional injuries can qualify as "actual damages" under same provision of the Privacy Act).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

FELICIA H. ELLSWORTH
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-5000

PATRICK J. CAROME
Counsel of Record
SAMIR JAIN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
patrick.carome@wilmerhale.com

AUGUST 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-708

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, Successor In Interest to the FIRST AMERICAN CORPORATION, and FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, Individually and on Behalf of All Others Similarly Situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

J. MITCHELL SMITH
GERMER GERTZ, L.L.P.
Three Allen Center
333 Clay Street, Suite 4950
Houston, TX 77002
(713) 650-1313

MARY-CHRISTINE SUNGAILA*
*Counsel of Record
SNELL & WILMER L.L.P.
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
(714) 427-7000
mcsungaila@swlaw.com

Attorneys for Amicus Curiae International Association of Defense Counsel

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. Article III Standing Embodies Separation of Powers Principles and Ensures that the Legislative Branch Does not Overpower the Judicial and Executive Branches	3
II. If Violation of a Statutory Right Unaccompanied by an Actual Injury Were Sufficient to Establish Constitutional Standing, Federal Courts Would be Overwhelmed with Cases in a Wide Variety of Subject Matter Areas	6
CONCLUSION	13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436 (2011) 6

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 6

City of Boerne v. Flores, 521 U.S. 507 (1997) 4

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 6

Freedman v. Town of Fairfield, 2006 U.S. Dist. LEXIS 66857 (D.Conn. Sept. 19, 2006) 7

Gambardella v. G. Fox & Co., 716 F.2d 104 (2d Cir. 1983) 8

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 6

Joint Stock Society v. UDV North America, Inc., 266 F.3d 164 (3d Cir. 2001) 11

Korman v. Walking Co., 503 F.Supp.2d 755 (E.D. Pa. 2007) 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3

Metrovision, Inc. v. Wood, 864 F.Supp. 675 (E.D. Mich. 1994) 9

Moore v. Radian Group, 233 F.Supp.2d 819 (E.D. Tex. 2002), *aff'd*, No. 02-41464 (5th Cir. May 30, 2003) 11, 12

TABLE OF AUTHORITIES – Continued

Page

Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC, 759 F.Supp.2d 417 (S.D.N.Y. 2010) 7

Purtle v. Eldridge Auto Sales, 91 F.3d 797 (6th Cir. 1996) 7, 8

Raines v. Byrd, 521 U.S. 811 (1997) 3

Ramirez v. Midwest Airlines, Inc., 537 F.Supp.2d 1161 (D. Kan. 2008) 10

Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 6

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 3

Summers v. Earth Island Inst., 555 U.S. 488, 129 S.Ct. 1142 (2009) 4

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) 3

Van Alstyne v. Elec. Scriptorium, Ltd., 560 F.3d 199 (4th Cir. 2009) 7

Warner v. American Cablevision of Kansas City, Inc., 699 F.Supp. 851 (D. Kan. 1988) 9

Warth v. Seldin, 422 U.S. 490 (1975) 3, 6

Whitmore v. Arkansas, 495 U.S. 149 (1990) 6

Wilson v. American Cablevision of Kansas City, Inc., 133 F.R.D. 573 (W.D. Mo. 1990) 8

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

15 U.S.C. § 1051 11

15 U.S.C. § 1601 7

15 U.S.C. § 1601(a) 7

15 U.S.C. § 1640(a)(1)-(4) 8

15 U.S.C. § 1681c(g) 10

15 U.S.C. § 1681n(a)(1)(A) 10

18 U.S.C. § 2701 7

18 U.S.C. § 2707(a)-(c) 7

47 U.S.C. § 551 8

47 U.S.C. § 551(f)(2)(A) 8

FEDERAL RULES

Supreme Court of the U.S. Rule 37 1

MISCELLANEOUS

Leonard, James and Brant, Joanne C. *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L.Rev. 1 (2001) 4

Roberts, John G., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993) 4

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions like this, which are increasingly global in reach, as well as in ensuring that actions are brought in the appropriate forum and decided by courts with proper jurisdiction.

---

[1] This brief was authored by *amicus* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or their counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

SUMMARY OF ARGUMENT

Petitioners and other *amici* have already explained at length why the absence of an injury in fact to Ms. Edwards dooms her suit. We do not repeat those arguments. Rather, we explain why recognizing that there can be no standing without injury in fact, even where a federal statute purports to provide a private right of action, is consistent with Article III's focus on maintaining the balance of power between the different branches of government. In particular, we explain that insisting on the injury in fact requirement furthers the Framers' intent to prevent the legislative branch from dwarfing the judicial and executive branches. We also present examples of other federal statutes beyond the Real Estate Settlement Procedures Act of 1974 (RESPA) which, in a world without an Article III injury in fact requirement, could give rise to increased litigation in federal court.

STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in the Petitioners' Brief.

ARGUMENT

I. ARTICLE III STANDING EMBODIES SEPARATION OF POWERS PRINCIPLES AND ENSURES THAT THE LEGISLATIVE BRANCH DOES NOT OVERPOWER THE JUDICIAL AND EXECUTIVE BRANCHES.

Article III standing presents a "threshold jurisdictional question" for the federal courts. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). In its most basic form, standing amounts to a determination that a party is entitled to have a federal court decide the merits of a dispute because the matter presents a real "case" or "controversy." That the plaintiff must have a personal stake in the outcome of a case or an "injury in fact" is just one component of the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Constitutional standing is separate from statutory standing. As this Court has acknowledged, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 487 n.24 (1982). Thus, even after Congress has authorized suit, "Art[icle] III's requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Indeed, recognizing injuries that only Congress has declared to exist would eliminate the "hard

floor" requirement that Article III imposes and run roughshod over the separation-of-powers limits provided by the Constitution. *Summers v. Earth Island Inst.*, 555 U.S. 488, ___, 129 S.Ct. 1142, 1151 (2009); *cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Standing is a "constitutionally based doctrine designed to implement the Framers' concept of 'the proper – and properly limited – role of the courts in a democratic society.'" Roberts, John G., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1220 (1993). "The legitimacy of an unelected, life tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary's power in Article III to actual 'cases' and 'controversies.'" *Id.* Standing, as Chief Justice Roberts has described it, can thus be "properly regarded as a doctrine of judicial self-restraint." *Id.* at 1221. The requirement of an injury in fact accordingly "flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separate government." *Id.* at 1224.

The injury in fact rule also carries out "the Framers' design for a balanced government" by separating out "those whose claims are essentially political, and thus should be addressed to the legislature or executive branch, from others whose claims are sufficiently individual and hence may be heard by the courts." Leonard, James and Brant, Joanne C. *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L.Rev. 1, 6 (2001).

The Framers sought to preserve liberty by providing for co-equal branches of government that would prevent one department from having an "'overruling influence'" on the others. *Id.* at 52. "To the Framers, tyranny was by definition the concentration of power in any one person, group or agency of government. . . . Madison saw the legislature as the greatest potential threat" because "there is a natural tendency for legislative power to predominate." *Id.* at 50.

Since the Constitution was intended not only "to maintain the integrity of the three branches of national government" but to "keep the legislative branch from dominating the other two," it would be improper to permit Congress to override by statute the standing limitations imposed by Article III. *Id.* at 65. After all, "[e]nforcement of the law is a political decision left to the executive branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as individualized entitlements would disrupt the balance that the Framers created. . . ." *Id.* at 115.

II. IF VIOLATION OF A STATUTORY RIGHT UNACCOMPANIED BY AN ACTUAL INJURY WERE SUFFICIENT TO ESTABLISH CONSTITUTIONAL STANDING, FEDERAL COURTS WOULD BE OVERWHELMED WITH CASES IN A WIDE VARIETY OF SUBJECT MATTER AREAS.

Article III requires a litigant to allege an injury that is "distinct and palpable," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501), "concrete," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), "certainly impending," *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), and "actual or imminent, not 'conjectural' or 'hypothetical'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). To eliminate this requirement and allow it to be trumped by a statutory pronouncement would promote "uncontrolled litigation threatening massive liability." *Petition for Writ of Certiorari*, p. 31. The threat of liability is even greater in this "era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1449 (2011).

A brief review of a variety of federal statutes reveals the wide-ranging adverse impact of eliminating or loosening the injury in fact requirement.

The Electronic Communications Privacy Act ("ECPA") and Stored Communications Act ("SCA"), 18 U.S.C. § 2701, *et seq.*, prohibit unauthorized access to electronic communications (e-mails) or stored electronic information. A violator is subject to civil liability in a claim by a consumer for statutory damages. 18 U.S.C. § 2707(a)-(c). There is a split of authority as to whether actual damages must be alleged to maintain an action under these statutes. *Compare Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 204-06 (4th Cir. 2009) (holding that statutory damages under the SCA are recoverable only where a plaintiff has also suffered *actual damages* (emphasis added) *with Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F.Supp.2d 417, 428 (S.D.N.Y. 2010) (finding Congress intended to allow statutory damages whether or not plaintiff suffered actual damages) and *Freedman v. Town of Fairfield*, 2006 U.S. Dist. LEXIS 66857 (D.Conn. Sept. 19, 2006) (same). Thus, absent an injury in fact requirement, internet service providers and businesses who access employee e-mails could be forced to unnecessarily defend claims under these statutes in federal court.

The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, imposes mandatory disclosure requirements on those who extend credit to consumers. TILA was specifically designed to remedy problems that had developed from the rapidly expanding use of consumer credit in the 1960's. *Purtle v. Eldridge Auto Sales*, 91 F.3d 797, 799-800 (6th Cir. 1996). The purpose of TILA, as stated by Congress, is as follows:

> It is the purpose of this title . . . to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . .

Id. quoting 15 U.S.C. § 1601(a).

TILA provides for statutory damages of up to $500,000. 15 U.S.C. § 1640(a) (1)-(4). Courts have interpreted this alternative-damages provision to allow a consumer to bring a claim without having to allege actual damages. *See, e.g., Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle*, 91 F.3d at 797. Thus, without an injury in fact requirement, any entity that lends money to consumers, including mortgage companies, credit-card issuers, banks, and car dealers, could be required to face claims under this statute in federal court.

The Cable Communications Privacy Act ("CCPA"), 47 U.S.C. § 551, requires a cable communications provider to disclose to consumers the extent of personally identifiable information collected from consumers and the anticipated use of such information. The CCPA allows a consumer to sue for "liquidated damages" of $100.00 per day. 47 U.S.C. § 551 (f)(2)(A). Courts have acknowledged the statute gives rise to a private right of action for statutory damages, even where actual damages may be lacking. *See, e.g., Wilson v. American Cablevision of Kansas City, Inc.*, 133 F.R.D. 573, 577 (W.D. Mo. 1990) (denying class certification but noting that a statutory

violation of the CCPA gives rise to a claim without any proof of actual damages); *Metrovision, Inc. v. Wood*, 864 F.Supp. 675, 680 (E.D. Mich. 1994) (allowing a claim for statutory damages where defendant cable customers in piracy suit bringing counterclaim for violation of CCPA did not show any actual damages as a result of cable companies' failure to provide required notice). As the district court in *Warner v. American Cablevision of Kansas City, Inc.*, 699 F.Supp. 851, 859 (D. Kan. 1988) explained:

> American [Cablevision of Kansas City, Inc.] violated section 551(a) by failing to make a privacy disclosure at the time it contracted to provide Warner cable service, and it further violated that same section by failing to make the proper disclosures in its bill stuffer. The court finds that Warner was thereby 'aggrieved' by American's violation of the Cable Act. No finding of actual damages or an actual invasion of privacy is required. In fact, it is difficult to conceive of how a subscriber might suffer 'actual' injury as a result of a cable operator's failure to timely provide the subscriber with the proper disclosures as required by section 551(a)(1). Yet, Congress did not limit recovery to those who are the subject of the violations under Subsections (b) through (e). All violations of the Cable Act are actionable.

Thus, if the injury in fact requirement were eliminated, cable providers could be routinely hailed into federal court for alleged violations of the CCPA.

The Fair and Accurate Credit Transactions Act of 2003 ("FACTA") requires a merchant to omit all but the last five digits of a customer's credit card number on receipts and provides a statutory damages provision for harm resulting from willful or knowing violations of the Act with respect to a consumer. 15 U.S.C. § 1681c(g), § 1681n(a)(1)(A). This statute, too, could be read to give rise to a federal court action in the absence of an injury in fact.

In *Ramirez v. Midwest Airlines, Inc.*, 537 F.Supp.2d 1161, 1163 (D. Kan. 2008), the plaintiff brought a putative class action lawsuit alleging the defendant violated FACTA by giving her a receipt that included her credit card's expiration date. Defendant moved for summary judgment on the basis of an expert's affidavit that the fact that plaintiff's receipt contained four digits of her credit card number and the card's expiration date could not have placed her or anyone else at risk of being the victim of fraud or identity theft; therefore, plaintiff could not show the injury in fact required for Article III standing. *Id.* The court disagreed, concluding that because "[a] statute itself may create a legal right," "the invasion of [that right] causes an injury sufficient to create standing." *Id. See also Korman v. Walking Co.*, 503 F.Supp.2d 755, 759 (E.D. Pa. 2007).

In contrast, some circuits have properly insisted that Congress should not be permitted to override the judicial standing requirements in the Constitution. In *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164, 168 (3d Cir. 2001) (Alito, J.) for example, the Third Circuit had the opportunity to analyze the injury in fact question in a case involving allegations of violations of the Lanham Act. 15 U.S.C. § 1051, *et seq.* The plaintiffs (a Russian company and Delaware company designated as its exclusive licensee) contended the defendants had misappropriated the Smirnov vodka name and misled consumers into believing that the Smirnov vodka sold in the United States was made in Russia and was the same product that was purveyed to the czar before the Russian Revolution. *Id.* Plaintiffs had never marketed any vodka in the United States and had not shown they were prepared to sell any vodka in this country that did not use the Smirnov name. *Id.* at 176. The Court determined plaintiffs' claims to be "conjectural" or "hypothetical" and that constitutional standing therefore was not met. *Id.* at 177.

In *Moore v. Radian Group*, the Fifth Circuit affirmed the district court's decision to dismiss putative class claims for alleged violations of RESPA. *Moore v. Radian Group,* 233 F.Supp.2d 819 (E.D. Tex. 2002), *aff'd*, 69 Fed. Appx. 659, 2003 U.S. App. LEXIS 12159 (5th Cir. 2003) (unreported; opinion *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf). The plaintiffs alleged that in connection with their home mortgages, plaintiffs' lenders

purchased "pool insurance" from Radian at low prices in exchange for the lenders' referral of primary mortgage insurance ("PMI") business to Radian. *Id.* at 822. Plaintiffs did not contend the PMI or any other settlement service they received was of inferior quality, or that any portion of their PMI payments was kicked back to the lenders or used to underwrite any of the insurers' below-market sales of pool insurance in exchange for the referral. *Id.* Rather, plaintiffs alleged they had standing under Article III because the defendants' allegedly unlawful kickbacks were *per se* violations of RESPA. *Id.* at 822-23. Unlike the Ninth Circuit in this case, the Fifth Circuit determined that plaintiffs had failed "to articulate or plead an actual injury in fact" and therefore lacked standing. Typed opn. at 13.

In order to prevent Congress from exercising unfettered power to confer standing in litigation and flood the federal courts with entirely new varieties of claims, this Court should reaffirm the independent constitutional injury in fact requirement.

CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

J. MITCHELL SMITH
GERMER GERTZ, L.L.P.
Three Allen Center
333 Clay Street, Suite 4950
Houston, TX 77002
(713) 650-1313

MARY-CHRISTINE SUNGAILA*
*Counsel of Record
SNELL & WILMER L.L.P.
600 Anton Blvd., Suite 1400
Costa Mesa, CA 92626
(714) 427-7000
mcsungaila@swlaw.com

Attorneys for Amicus Curiae
International Association of Defense Counsel

AMICUS CURIAE BRIEF

No. 10-708

OCT 18 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, *et al.*, Petitioners,

v.

DENISE P. EDWARDS, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF RESPONDENT

STEPHEN M. DANE
RELMAN, DANE
& COLFAX PLLC
1225 19th Street, NW
Suite 600
Washington, DC 20036

JOHN PAYTON
DEBO P. ADEGBILE
ELISE C. BODDIE
RYAN DOWNER
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street
16th Floor
New York, NY 10013

JANELL M. BYRD
Counsel of Record
ZACHARY BEST
MEHRI & SKALET, PLLC
1250 Connecticut Ave., NW
Suite 300
Washington, DC 20036
(202) 822-5100
jbyrd@findjustice.com

JON M. GREENBAUM
JOSEPH D. RICH
JOHN K. DIPAOLO
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005

(Additional Counsel Listed on Inside Cover)

238696

LESLIE PROLL
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

MEGAN K. WHYTE
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
(202) 319-1000

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. Petitioners and Respondent Agree that *Havens Realty Corp. v. Coleman* is Correctly Decided and No Party Has Called for Reconsideration or Modification of that Decision 6

II. The Principle Affirmed in *Havens* and Other Cases that Congress Can Define Legal Rights, the Invasion of Which Constitutes Injury for Purposes of Article III, Is Well-Established in the Court's Standing Jurisprudence 8

III. *Havens* Embraces Congressionally Defined Injuries in Support of Tester Standing And Does Not Require the Plaintiff to Allege an Injury Different From or in Addition to that Defined by Congress 13

Table of Contents

Page

A. Injury Based on the Denial of the Congressionally Created Right to Truthful Information About the Availability of Housing 16

B. Injury Based on the Denial of the Congressionally Created Right to Equal Treatment on the Basis of Race Regarding Information About the Availability of Housing 17

IV. The Congressional Decision to Allow Parties to the Conflicted Transactions to Enforce the Statutory Prohibition on Harmful Practices Does Not Offend Article III. 20

A. Once Threshold Injury is Established, It Does Not Offend Article III That Congress Has Structured an Enforcement Scheme That Allows Involved Parties to Sue, But Because of Difficulties of Proof Relieves Them of Making an Additional, More Specific Showing of Financial Harm. 20

Table of Contents

Page

B. This Case is Far From the Outer Limits of Judicially Cognizable Injuries as Plaintiff Alleges that She Was a Party to a Transaction Involving a Kickback Prohibited by Congress and She Wishes to Sue about that Transaction 26

CONCLUSION 28

TABLE OF CITED AUTHORITIES

Page

CASES

Allen v. Wright,
468 U.S. 737 (1984) 27

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009)..... 21

Am. Trucking Ass'ns v. United States,
344 U.S. 298 (1953) 24-25

Babbitt v. UFW Nat'l Union,
442 U.S. 289 (1979) 9

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 7

Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.,
236 F.3d 629 (11th Cir. 2000) 6-7

City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.,
982 F.2d 1086 (7th Cir. 1992) 20

Dep't of Air Force v. Rose,
425 U.S. 352 (1976) 12

Dep't of Justice v. Julian,
486 U.S. 1 (1988) 12

Cited Authorities

Page

Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 12

Evers v. Dwyer, 358 U.S. 202 (1958) 18

Fair Hous. of Marin v. Combs, 285 F.3d 899 (9th Cir. 2002) 4

FBI v. Abramson, 456 U.S. 615 (1982) 12

FEC v. Akins, 524 U.S. 11 (1998) 4, 12, 17

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 5, 8-9, 25

Gemsco Inc. v. Walling, 324 U.S. 244 (1945) 24

Gladstone, Realtors v. City of Bellwood, 441 U.S. 91 (1979) 3, 9, 16

Gratz v. Bollinger, 539 U.S. 244 (2003) 9

Hardin v. Kentucky Utils Co., 390 U.S. 1 (1968) 10

Cited Authorities

Page

N. Am. Co., v. SEC,
327 U.S. 686 (1946) 24

Pierson v. Ray,
386 U.S. 547 (1967) 18

Plains Commerce Bank v. Long Family Land and Cattle Co.,
554 U.S. 316 (2008) 9

Public Citizen v. Dep't of Justice,
491 U.S. 440 (1989) 4, 11, 12

Ragin v. Harry Macklowe Real Estate Co.,
6 F.3d 898 (2d Cir. 1993) 7

Schelsinger v. Reservists to Stop the War,
418 U.S. 208 (1974) 27

Sierra Club v. Morton,
405 U.S. 727 (1972) 10, 11, 14

Spann v. Colonial Vill., Inc.,
899 F.2d 24 (D.C. Cir. 1990) 7, 26

Sprint Commc'ns Co. v. APCC Servs.,
554 U.S. 269 (2008) 9

Summers v. Earth Island Inst.,
555 U.S. 488, 129 S. Ct. 1142 (2009) 8, 9

Cited Authorities

Page

Tigner v. Texas,
310 U.S. 141 (1940) 25

Trafficante v. Metro. Life Ins.,
409 U.S. 205 (1972) 2, 9, 10, 14

United States v. Balistrieri,
981 F.2d 916 (7th Cir. 1992) 7

United States v. Weber Aircraft Corp.,
465 U.S. 792 (1984) 12

Valley Forge Christian College v. Ams. United for the Separation of Church and State,
454 U.S. 464 (1982) 27

Vt. Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 9

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 8

Vill. of Bellwood v. Dwivedi,
895 F.2d 1521 (7th Cir. 1990) 20

Vill. of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926) 24

Cited Authorities

Page

Warth v. Seldin,
422 U.S. 490 (1975) ..... *passim*

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fair Housing Act, 42 U.S.C. § 3601, *et seq.* 6, 14

Fair Housing Amendments Act of 1988,
Pub. L. 100-430, 102 Stat. 1619-39 (1988) 6

Federal Advisory Committee Act, 5 U.S.C.
App. § 1 *et seq.* 11

Federal Election Campaign Act, 2 U.S.C.
§ 431(4) 12

Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs, 92d Cong., 73-74 (Mar.1-3, 1972). 21

Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency,
90th Cong., 1st Sess. (1967) 19

Real Estate Settlement Procedures Act,
12 U.S.C. § 2601, *et seq.* 20, 21, 22, 27

Page

Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs, Ser. No. 97-24 (Sept. 15-16, 1981) 21, 22

S. Rep. No. 93-866 (1974) 22

Truth in Lending Act, 15 U.S.C. § 1604, *et seq.*..... 23

U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, REPORT ON THE PRICING AND MARKETING OF INSURANCE (1977) *reprinted in part in* 1981 House Hearings 221-83, 273 22

MISCELLANEOUS

Debbie G. Bocian, et al., Center for Responsible Lending, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages (2006) 7

Douglas Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1993) 6

PEAT, MARWICK, MITCHELL & CO., RESEARCH ON REAL ESTATE SETTLEMENT PRACTICES AND COSTS: BASELINE STUDY OF TITLE INSURANCE INDUSTRY (Feb. 1980)..... 21

Cited Authorities

Page

Residential Segregation and Housing Discrimination in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination, A Report to the U.N. Committee on the Elimination of Racial Discrimination (2008), *available at* http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx 7

Robert G. Schwemm, Housing Discrimination: Law and Litigation (2010) 16

Margery A. Turner, et al., Report to the U.S. Department of Housing and Urban Development, Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000 (2002) 7

John Yinger, Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination (1995). 6

INTEREST OF AMICI[1]

Amici are civil rights organizations committed to the effective enforcement of anti-discrimination laws and the preservation of access to the courts for victims of discrimination.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS, and Washington, D.C. Among its fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory employment, voting, education, housing and lending practices. In the past, the Lawyers' Committee has been involved as amicus curiae in cases before the Supreme Court involving standing issues, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975).

---

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, *amici* note that on July 11 and August 12, 2011, counsel for Petitioners and counsel for Respondent, respectively, filed blanket consents to the filing of amicus curiae briefs, in support of either or neither party.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization established to assist African Americans in securing their civil and constitutional rights. For more than seven decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the U.S. Supreme Court, including appearances in standing cases, such as *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *Trafficante v. Metropolitan Life Insurance*, 409 U.S. 205 (1972), and *Warth v. Seldin*, 422 U.S. 490 (1975), which have shaped the ability of civil rights plaintiffs to access federal courts. LDF attorneys have also litigated cases under consumer protection laws that inure to the benefit of racial minorities, including *Mourning v. Family Publications Service*, 411 U.S. 356 (1973).

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("The Committee") is a non-profit civil rights organization established to eradicate discrimination and entrenched poverty in the Washington, D.C. metropolitan area, including Maryland and Virginia. Leveraging its own broad expertise in civil rights litigation with the resources of Washington, D.C.'s private bar, the Committee's litigation has a national impact in the areas of housing, lending, employment, public accommodations, education, immigrant and refugee rights, and other aspects of urban life. By litigating fair housing cases for approximately forty years, the Committee has amassed expertise in issues of standing in fair housing cases, as well as in fair housing law generally.

The National Fair Housing Alliance ("NFHA") is a consortium of private, nonprofit fair housing organizations, state and local civil rights groups, and individuals.

NFHA was founded in 1988 to identify and eliminate discrimination in housing markets and ensure equal access to housing for all people protected by national, state, and local civil rights laws. Through education, outreach, policy initiatives, advocacy and enforcement, NFHA promotes equal housing and equal lending opportunities. Relying on the Fair Housing Act and Supreme Court standing decisions interpreting it, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91 (1979), NFHA and its members have undertaken important enforcement initiatives in cities and states across the country, including refusals to lend and other discriminatory practices by lenders. Those efforts have contributed significantly to the nation's efforts to eliminate discriminatory lending practices.

SUMMARY OF THE ARGUMENT

Amici submit this brief in support of the Respondent.

The Parties agree that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is correctly decided and no Party or Amicus has asked the Court to reconsider or modify that decision in any way.

The principle affirmed in *Havens*, that Congress can define rights, the invasion of which will constitute injury for purposes of Article III, is well established in this Court's standing jurisprudence. The Court recognized this principle before *Havens* in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), and after it in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), and, more recently, in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). This Court

and lower federal courts have applied it in numerous cases, including *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), and *FEC v. Akins*, 524 U.S. 11 (1998). The Court has also held in numerous cases that "intangible" injury, which is the type of injury at issue here, can be sufficient for Article III purposes. *See, e.g., Public Citizen v. Dep't of Justice*, *FEC v. Akins*, and *Massachusetts v. EPA*; *see also* note 8, *infra*. Thus, there is no need for the Court to resolve the differences between the Parties regarding the particular congressionally identified injury recognized in the *Havens* case in order to answer the Question Presented in this Case.

Amici further submit that, while the *Havens* opinion can fairly be read to embrace two congressionally identified injuries (distinct from causes of action) as sufficient to support Article III standing for testers, the Court did not require a showing of injury different from or in addition to those identified by Congress. The injuries recognized were derived from 1) the congressionally created right to truthful information regarding the availability of housing, and 2) the congressionally created right to be free from unequal treatment on the basis of race (i.e. discriminatory misrepresentations) regarding the availability of housing. Either or both congressionally defined intangible injures were sufficient — without allegations of emotional distress or stigma — to support tester standing pursuant to *Havens*. *Accord Public Citizen*, 491 U.S. at 449 (holding that nothing more than the congressionally defined injury was required to be alleged for purposes of standing).

Once the threshold injury is established — here, a conflict of interest in the sale of loan settlement services in the form of a kickback – it does not offend Article III

that Congress has structured a remedial scheme that allows private citizens involved in private transactions (persons who discover kickbacks in their loan transactions) to utilize the courts, but who, because of difficulties of proof, are relieved of making an additional, specific showing of economic harm. Nor has the Court required, in this context, that the remedial scheme adopted by Congress require proof of a precise fit between persons with transactions involving practices prohibited by the statute and all the harms about which Congress expressed concern in enacting the statute. *See Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-84 (2000) (recognizing selection of an appropriate remedial scheme as a legislative matter). Where Congress has found a systemic effect of kickback schemes on the market, to require under Article III that each person with a transaction involving a kickback prove an actual overcharge, as Petitioners suggest, would disrupt the enforcement scheme selected by Congress, while serving no legitimate interest under Article III.

Finally, because this case involves a dispute between private parties regarding a right defined by Congress in connection with conflicts of interest in private housing transactions and Ms. Edwards was personally involved in such a transaction, it is far from the outer limits of the "case" or "controversy" requirement of Article III to allow Ms. Edwards to use the federal courts to seek the relief authorized by Congress. The Article III injury precedents of this Court almost all involve suits against the government and assertions of generalized grievances or undifferentiated public interests. *Lujan*, 504 U.S. at 573-74, 576-77. This is not such a case.

ARGUMENT

I. Petitioners and Respondent Agree that *Havens Realty Corp. v. Coleman* is Correctly Decided and No Party Has Called for Reconsideration or Modification of that Decision

In a unanimous 1982 decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court held that testers and fair housing organizations can have standing to sue under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*[2] The Court's ruling made possible meaningful enforcement of the Act to address widespread, entrenched racial segregation and discrimination in the nation's housing market.[3] The need for the Act was underscored by Congress's adoption of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988), strengthening the Act's enforcement provisions and adding protections for persons with disabilities and families with children. For almost thirty years, federal courts have followed the *Havens* decision in cases brought to enforce the fair housing mandate of Congress.[4] Despite

---

2. The Court defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373.

3. For the history of housing discrimination in the United States see JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

4. *See, e.g., Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002); *Cent. Alabama Fair Housing Ctr., Inc. v. Lowder Realty Co.*, 236

significant efforts by private parties and state and federal governments to combat housing discrimination and some recent reduction in the number of housing discrimination incidences reported, the nation's housing market continues today to be marked by a high degree of segregation and widespread discriminatory practices.[5] This underscores the ongoing critical importance of the *Havens* decision in furthering Congress's goal of a fair, open and non-discriminatory housing market.

Petitioners and Respondent both discuss *Havens* in their briefs.[6] While they differ about the specific congressionally defined injury recognized by the Court in *Havens* and whether it supports a finding of injury in this

---

F.3d 629, 639 (11th Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *U.S. v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990).

5. *See generally* RESIDENTIAL SEGREGATION AND HOUSING DISCRIMINATION IN THE UNITED STATES: VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, A REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2008), *available at* http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx; MARGERY A. TURNER, ET AL., REPORT TO THE U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000 (2002); DEBBIE G. BOCIAN, ET AL., CENTER FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006).

6. Petitioners' Brief at 12, 15, 21, 30; Respondent's Brief at 38, 39.

case, no Party or supporting *Amicus* questions the Court's ruling in *Havens* or asks that the decision be reconsidered or modified in any way. Because the Court has for over 30 years affirmed the principle that Congress can identify new injuries for purposes of Article III standing and has in many contexts determined that particular intangible injuries are sufficient for Article III purposes, see Section II below, *Amici* submit that there is no need and the Court should not attempt to resolve the Parties' differences about the injury recognized in *Havens* in order to answer the Question Presented here. This is particularly true because that issue is not presented in a concrete factual context nor fully briefed on the merits.[7]

II. The Principle Affirmed in *Havens* and Other Cases that Congress Can Define Legal Rights, the Invasion of Which Constitutes Injury for Purposes of Article III, Is Well-Established in the Court's Standing Jurisprudence

In order to satisfy the "case" or "controversy" requirement of Article III standing "the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Congress cannot, by statute, remove the injury in fact requirement. *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009). The injury itself, however, is not required to be of a pecuniary or physical nature. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-63 (1977). It may involve an aesthetic, conservational or recreational interest. *Friends of the Earth, Inc. v.*

---

7. Nor does this case present any question or cast any doubt on the use of testers to collect evidence of housing discrimination, or on the admissibility of that evidence in fair housing lawsuits.

Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181-84 (2000) (damage to environmental group members' recreational, aesthetic and economic interests because of their reasonable concern over discharges in river, even without showing that environment had actually been harmed); *accord Summers*, 129 S. Ct. at 1149 (it will suffice even if the harm affects the "mere esthetic interests of the plaintiff").[8] The Court has acknowledged a "broadening [of] the categories of injury" that will support Article III

---

8. This Court has recognized a broad range of largely intangible, noneconomic, nonphysical injuries as adequate bases for Article III standing. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 326 (2008) (judicially imposed requirement to undo a sale of land and to sell land to a different buyer, even for same amount of money); *Sprint Commc'ns. Co. v. APCC Servs.*, 554 U.S. 269, 274-75 (2008) (payphone operator's contractual claim for payment from long-distance carrier as assigned to billing and collection agency for flat fee regardless of outcome of suit); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (denial of opportunity to compete on an equal basis without regard to race); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (injury suffered by United States in suit by *qui tam* relator); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (damage to personal, political and professional reputation of attorney and politician due to Justice Department's designation of films he wished to show as "political propaganda"); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization and perpetuation of stereotypes due to discriminatory treatment); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (credible threat of prosecution for activity protected by First Amendment); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 109-115 (1979) (village's loss of racial balance and stability and individuals' loss of social, professional and economic benefits of living in an integrated community); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208-210 (1972) (tenants' loss of social, business and professional advantages and embarrassment and economic damages due to living in a non-integrated apartment complex).

standing, but it has not abandoned the requirement of injury. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

In recognition of the power of Congress under Article I of the Constitution to make the laws and its status as a co-equal branch of our government, the Court has also repeatedly affirmed that "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth*, 422 U.S. at 500 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973) and *Sierra Club v. Morton*, 405 U.S. at 732). Quoting this passage from *Warth* with approval, and stating that nothing in the opinion contradicts it, the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), explained:

> Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-212 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968)).[9] As we said in *Sierra Club*, "[Statutory] broadening

9. In *Hardin*, the Court held that when a statute "reflect[s] a legislative purpose to protect a competitive interest," the competitor has standing to require compliance with the statute. 390 U.S. at 6.

> [of] categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S. at 738.

Id. at 578. As a necessary fifth vote for this section of the *Lujan* opinion, Justice Kennedy, joined by Justice Souter in a separate concurrence, stated that the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define new injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ." *Id.* at 580. The Court reaffirmed that Congress has the power to define new injuries for purposes of standing in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), discussed more fully below.

Beyond the case examples cited in *Lujan*, the Court has affirmed statutory broadening of legally cognizable injury in other cases. In *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), two public interest organizations brought an action against the Department of Justice. The organizations sought to make the American Bar Association's Standing Committee on Federal Judiciary, from which the Department regularly sought advice on federal judicial nominations, subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. § 1 *et seq.* *Id.* at 433. The Court found that the refusal to permit scrutiny of the Committee's activities "*to the extent FACA allows* constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449 (emphasis added). The Court relied explicitly on five cases decided

on the merits under the Freedom of Information Act ("FOIA"),[10] emphasizing that it has "*never suggested that those requesting information under [FOIA] need show more than that they sought and were denied specific agency records.*" *Id.* (emphasis added).

FEC v. Akins, 524 U.S. 11 (1998), involved a claim by a group of voters seeking to challenge the Federal Election Commission's ("FEC") determination that a particular entity was not a "political committee" as defined by the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431(4). As a result of the FEC's decision, the target group was not required to disclose its membership, contributions or expenditures, which the FECA would have otherwise required. *Id.* at 13. This Court held that the group of voters had standing to challenge the FEC's determination in court and found injury in fact based on the voters' inability to obtain information that would be required to be publicly disclosed pursuant to the FECA. *Id.* at 21. The Court cited in support of this holding both *Public Citizen*, discussed above, and *Havens Realty*, discussed below. *Id.*

Finally, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), private environmental organizations joined by intervenor states and local governments sought review of an EPA decision refusing to grant their petition to begin rulemaking regarding the emission of greenhouse gases. Citing Justice Kennedy's concurrence in *Lujan*,

---

10. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Dep't of Justice v. Julian*, 486 U.S. 1 (1988); *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *FBI v. Abramson*, 456 U.S. 615 (1982); *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976).

id. at 516, and emphasizing the special status of states in the Article III standing analysis, the Court found that the plaintiffs were litigants to whom Congress had "accorded a procedural right to protect [their] concrete interest — here the right to challenge agency action unlawfully withheld." *Id.* at 517 (internal citations and quotation marks omitted). The Court also found concrete injury in the allegations of harm to states resulting from greenhouse gases. *Id.* at 521-23.

Thus, the congressional creation of legal rights identifying injuries not previously recognized carries great weight in any judicial determination whether a plaintiff has alleged a cognizable injury for purposes of Article III standing.[11]

III. *Havens* Embraces Congressionally Defined Injuries in Support of Tester Standing And Does Not Require the Plaintiff to Allege an Injury Different From or in Addition to that Defined by Congress

The *Havens* decision can be fairly read to embrace two congressionally defined injuries. Either or both of these injuries exemplify the principle of congressional identification of injuy for purposes of standing and the recognition of intangible harm as cognizable under Article III. Contrary to what Petitioners seem to suggest,[12] *Havens* did not require the tester plaintiffs to articulate some injury different from or in addition to the injuries defined by Congress.

---

11. As addressed below in Section IV.B, the Court has imposed outer limits on the types of injuries that it will recognize for purposes of Article III standing. This case does not approach those limits.

12. Petitioners' Brief at 15, 30.

Havens presented the question whether testers have standing to sue under Section 804(d) of the Fair Housing Act, 455 U.S. at 373, which provides that it is unlawful:

> [t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

42 U.S.C. 3604(d). The case involved two testers, one white and one black. 455 U.S. at 368. The Complaint alleged that on four separate occasions the black tester had been told (untruthfully) by the defendant that apartments were not available, while the white tester was told (truthfully) that apartments were available. *Id.* at 374 (citing App. 16, para. 13). The Court relied directly on the congressionally defined injuries in analyzing the standing of the two testers.

> This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[the] actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth v. Seldin, supra* at 500, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973). Accord, *Sierra Club v. Morton*, 405 U.S, 727, 732 (1972); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J. concurring).

Id. at 373. The Court held that the black tester who received false information had standing under Article III

and the white tester who received accurate information did not. *Id.* at 374-75.

One rationale of injury in *Havens* rests on the Court's recognition that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing." *Id.* at 373 (stated differently – receiving truthful information about the availability of housing is recognized by Congress as a thing of value, the denial of which creates injury).[13] Another rationale of injury present in the opinion and in the express language of Section 804(d) of the Fair Housing Act is the right not to be given false information about the availability of housing *because of* race, national origin or other protected status. *See id.* This can fairly be described as a right to equal treatment on the basis of race or other status protected by the statute. Either or both of these rationales support Respondent's position in this case.[14] Regardless of which

---

13. It is important to emphasize the difference between cognizable injury sufficient to satisfy the "injury-in-fact" element of Article III standing and the elements of a cause of action. The injury that flows from the right to truthful information about the availability of housing — by itself — would not give a person a cause of action under Section 804(d). The person would also have to show that she was given false information *because of her race*. Thus, if two testers, one white and one black, were both given the same false information about the availability of housing without regard to race — both would suffer an injury, but neither would have a cause of action under Fair Housing Act.

14. In addition to tester standing, *Havens* also recognized the concept of "neighborhood" standing, where a black or white resident might show that the racial steering practices of the defendants deprived her of the benefits of living in an integrated community, which is a cognizable injury for purposes of Article III

is invoked, the Court did not require the testers to allege any injury different from or in addition to those recognized by Congress. *See id.* at 374. Specifically, the tester was not required to allege emotional distress or humiliation upon learning that she had been given false information. *Havens* imposes no such requirement. *See id.*

A. Injury Based on the Denial of the Congressionally Created Right to Truthful Information About the Availability of Housing

The *Havens* Court found that in Section 804(d) Congress had conferred a broad right to truthful information regarding the availability of housing. *Id.* at 373. It reached this conclusion based on the fact that in Section 804(a) of the Act, prohibiting discriminatory refusals to sell or rent, Congress had required that there be a "bona fide offer" to rent or purchase. *Id.* at 374. In contrast, in Section 804(d) Congress "had plainly omitted any such requirement insofar as it banned discriminatory representations. . . ." to "any person." *Id.* The conferral of the Section 804(d) rights to "any person" made clear that Congress intended to include people who were not bona fide purchasers or renters, such as testers, in the coverage of the Section. As such, it appears that Congress sought to allow the use of testers in order to provide effective challenges to one of the key devices by which housing discrimination was accomplished — the provision of false

---

standing. 455 U.S. at 375-78. This injury is based on the fact that in the Fair Housing Act Congress identified a valuable interest in integrated neighborhoods, *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3 (2010), the denial of which will establish injury in fact. 455 U.S. at 375-78; *see also Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91 (1979).

information. *Id.* at 374 n. 14. Thus, by virtue of Congress's recognition that the provision of such false information constitutes direct, cognizable harm, the individuals who were lied to were afforded the right to enforce the Act and aid in ending discrimination, regardless of whether they actually sought housing.

The Court held that injury in the form of the receipt of false information about the availability of housing — which Congress had recognized as a harm — was sufficient injury for purposes of Article III standing. *Id.* at 373-74; *see also FEC v. Akins*, 534 U.S. at 21 (citing *Havens* for the proposition that "deprivation of information about housing availability constitutes 'specific injury' permitting standing"). The Court did not require a further showing as to how the false information harmed the tester.

B. Injury Based on the Denial of the Congressionally Created Right to Equal Treatment on the Basis of Race Regarding Information About the Availability of Housing

There is a second independent rationale supporting the finding of injury to the tester in *Havens*. It is the denial of equal treatment on the basis of race — an injury that also presents itself on the face of the statute. Section 804(d), which, in its terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. The black tester who was lied to about the availability of apartments was lied to "because of" her race. This injury is as real as that experienced by a tester who presents himself at a lunch counter and is told he cannot be served because of his race. He will not be required to prove that he truly wanted a

sandwich in order to show injury for purposes of Article III standing.

The *Havens* opinion states that the fact that the tester may have approached the real estate agent expecting to be given false information without an intention of purchasing or renting "does not negate the simple fact of injury within the meaning of § 804(d)." *Id.* at 374. The opinion then cites cases involving testers from the mid-20th Century civil rights sit-ins, specifically, *Pierson v. Ray*, 386 U.S. 547, 558 (1967), and *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam). *Id.* While *Pierson* involved an illegal arrest following a sit-in at a bus terminal in Jackson, Mississippi, and is therefore distinguishable, *Evers* involved a black person who attempted to ride at the front of a bus, but who was told "to go to the back of the bus, get off, or be arrested," whereupon he left the bus. 358 U.S. at 204. The Court stated that the bus rider was not "bound to continue to ride . . . at the risk of arrest" if he refused to sit in the back, in order to show an "actual controversy." *Id.* The Court further held that the fact that the bus rider "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.* The Court has ruled that the denial of equal treatment on the basis of race constitutes a cognizable injury regardless of whether the plaintiff can show that he ultimately would have received the benefit absent the discriminatory treatment. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

In enacting the Fair Housing Act, the record before Congress showed that the use of discriminatory misrepresentations about the availability of housing were a particularly widespread and effective device used to maintain segregation. It had the effect of not only denying particular individuals housing, it also had a broader

deterrent effect on blacks in the housing market. The Court noted in footnote 14 of the *Havens* decision that Congress was aware that "[v]arious witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available." 455 U.S. at 374 n.14. Robert Weaver, Secretary of the U.S. Department of Housing and Urban Development, testified before Congress that there was a great problem with people being lied to about the availability of housing and that this had the effect of deterring black people from continuing to seek housing outside of "ghetto" areas. "You know, after a man hits his head up against a brick wall time and time again, he then even doubts when he sees a little opening in that wall lest it be a snare and a delusion."[15]

Thus, Congress identified differential treatment on the basis of protected status as a concrete injury and sought to eliminate that treatment through the Fair Housing Act. Consistent with that approach, the Court did not require the black tester in *Havens* to allege an injury different from or in addition to the unequal treatment itself to establish injury under Article III. While she likely experienced humiliation, embarrassment and distress, or racial insult and stigma as Petitioners describe it,[16] the *Havens* opinion on tester standing makes no reference to such injury or to any allegation thereof. The Court, however, certainly has recognized this injury exists. *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984) (explaining that discrimination itself can create serious

---

15. *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., 43 (1967) (statement of Robert Weaver, Sec. of U.S. Dep't of Housing and Urban Dev.).

16. Petitioners' Brief at 15.

noneconomic injuries and citing *Havens*). But the courts have not required such an additional showing for purposes of standing. *See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (housing testers were treated in a "racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself") (quoting *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)).

IV. The Congressional Decision to Allow Parties to the Conflicted Transactions to Enforce the Statutory Prohibition on Harmful Practices in the Market Does Not Offend Article III

A. Once Threshold Injury is Established, It Does Not Offend Article III That Congress Has Structured an Enforcement Scheme That Allows Involved Parties to Sue, But Because of Difficulties of Proof Relieves Them of Making an Additional, More Specific Showing of Financial Harm

Prompted by evidence that widespread discriminatory misrepresentations regarding the availability of housing were causing discrimination and segregation in the housing market, Congress adopted Section 804(d) of the Fair Housing Act. In doing so, it recognized a class of persons who actually received false information about housing, including testers, who could sue to enforce the Act. Similarly, in enacting the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, Congress had before it evidence that widespread kickback schemes in the sale of residential real estate settlement services were adversely affecting the price and quality of

services.[17] The record also showed that it was difficult to get accurate information about these practices and that they were hard to deter or police.[18] This, too, is similar to the problem of discriminatory misrepresentations about housing availability – without testers it was hard to identify or police. With RESPA's statutory goal of eliminating kickbacks and referral fees,[19] in Section 8(d)(2) Congress established a right for persons who actually purchased settlement services involving kickbacks to be the recipients of a statutory civil penalty. Congress did not require proof of actual economic harm,[20] as unwinding the effect of kickbacks on the market and amount of an overcharge would be a difficult if not insurmountable

---

17. *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 92d Cong., 1-3, 332, 339 (Feb. 22-24, 1972); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 73-74 (Mar.1-3, 1972).

18. *See* PEAT, MARWICK, MITCHELL & CO., RESEARCH ON REAL ESTATE SETTLEMENT PRACTICES AND COSTS: BASELINE STUDY OF TITLE INSURANCE INDUSTRY (Feb. 1980) (Congressionally-authorized study describing the difficulty of proving the cost impact of kickbacks).

19. "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result . . . (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b).

20. *See Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759-62 (3d Cir. 2009).

hurdle, effectively defeating Congress's goal of penalizing and deterring wrongdoers through strong enforcement.[21]

The injury here — a conflict of interest in the sale of loan settlement services in the form of a kickback[22] — identified by Congress based on findings that these kickbacks "prejudice the kind of disinterested advice . . . the consumer deserves,"[23] are likely to result in "poor service or ... faulty title examinations,"[24] and "tend to increase the costs of settlement services without providing any benefits to the home buyer,"[25] is sufficiently concrete to establish a controversy for judicial resolution. Courts historically have adjudicated this type of injury,[26] and it should be approved here. To hold otherwise would invite a radical change in the relationship between the Courts and Congress and threaten many statutes adopted for the protection of common citizens involved in everyday transactions in contexts rife with hidden manipulations,

---

21. *See supra*, note 17 and 12 U.S.C. § 2607(d) establishing penalties for violations.

22. See Respondent's Brief at 19.

23. *Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs*, Ser. No. 97-24, 159 (Sept. 15-16, 1981) ("1981 House Hearings").

24. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, REPORT ON THE PRICING AND MARKETING OF INSURANCE (1977) *reprinted in part in* 1981 House Hearings 221-83, 273.

25. S. Rep. No. 93-866, at 6 (1974); see also 12 U.S.C. § 2601(b).

26. See Respondent's Brief at 19-25, for a discussion of the historical recognition of injury in conflicted transactions.

risks and harm.[27] Where Congress has, on the basis of a substantial record, identified this harm, adopted prophylactic measures, and empowered actual home buyers with conflicted transactions to seek a legal remedy, affirming standing to pursue a claim in no way offends Article III.

Further, Article III does not mandate that after the identification of a threshold injury, the enforcement scheme adopted by Congress must nonetheless require proof of a precise fit between the plaintiff and other harms about which Congress expressed concern in enacting the statute. The Court has approved enforcement schemes utilizing individuals who were parties to transactions involving practices targeted by Congress, but who, because of difficulties of proof, are not required to make a showing of actual financial harm. In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), Family Publications Service (FPS) objected to the application of the "Four Installment Rule" under the Truth in Lending Act, 15 U.S.C. § 1604, *et seq.* (2011). The Rule required certain disclosures to the consumer whenever there was a finance charge or where there was an agreement that the amount owed could be paid in more than four installments. 411 U.S. at 358, 362. The district court found that FPS violated the Rule because it had extended credit under an agreement that was payable in more than four installments, but had failed to make the disclosures required under the Act. *Id.* at 362. FPS challenged the Rule, essentially objecting to being subjected to the disclosure requirements and the statutory penalty for failure to comply with them, when it contended that —

27. *Id.* at n.10.

despite more than four installments in its agreement with the plaintiff — there was not in fact a finance charge. *Id.* at 362. Congress found that distinguishing transactions with and without finance charges was difficult as these charges were often hidden by various means. *Id.* at 365-66.

The Court upheld the Rule stating:

> A similar rule applies when a remedial provision requires some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-389 (1926), the Court held that, in defining a class subject to regulations, "the inclusion of a reasonable margin to insure effective enforcement, will not put upon a law otherwise valid, the stamp of invalidity." See also *North American Co., v. SEC*, 327 U.S. 686 (1946). Nothing less will meet the demands of our complex economic system. Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. That this rationale applies to administrative agencies as well as to legislatures is implicit in both *Gemsco* [*Inc. v. Walling*, 324 U.S. 244 (1945)] and *American Trucking Assns.* [*v. United States*, 344 U.S.

> 298 (1953)]. In neither case was every individual engaged in the regulated activity responsible for the specific consequences the agency sought to eliminate.

Id. at 374. In *Friends of the Earth*, the Court quoted approvingly Justice Frankfurter's opinion in *Tigner v. Texas*, 310 U.S. 141, 148 (1940), acknowledging Congress's core legislative function in the selection of remedial schemes.:

> How to effectuate policy — the adaptation of means to legitimately sought ends — is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.

528 U.S. at 186-87. Requiring under Article III that Ms. Edwards and every other plaintiff prove an actual overcharge in addition to injury to the right to be free from conflicted settlement transactions, as Petitioners seek, would disrupt the statutory enforcement scheme, while serving no legitimate interest under Article III.

B. This Case is Far from the Outer Limits of Judicially Cognizable Injuries as Plaintiff Alleges that She Was a Party to a Transaction Involving a Kickback Prohibited by Congress and She Wishes to Sue about that Transaction

The outer limits of cognizable injuries defined by Congress for purposes of Article III have been clearly articulated by the Court. In *Lujan* the Court held that Article III standing does not extend to the elevation of injuries and enforceable rights for undifferentiated public interests, generalized grievances about the operation of government, or the promotion of every citizen's right to the proper application of the laws. *Lujan*, 504 U.S. at 573-74, 575-77. Further, the opinion in *Lujan* recognizes that suits involving the government, as distinguished from disputes between private parties, such as this, raise more troubling considerations for purposes of Article III standing, implicating core separation of powers concerns. *Id.* at 576-77. The Court is explicit that *Lujan*'s holding focuses on these public rights issues, stating in the penultimate paragraph, "[I]t is clear that *in suits against the Government*, at least, the concrete injury requirement must remain." *Id.* at 578 (emphasis added).

Federal courts, including this Court, have long acknowledged the significant differences for purposes of standing between suits against the government and suits involving "private actors suing other private actors, [which is] traditional grist for the judicial mill." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Ginsburg, J.). The U.S. Court of Appeals for the District of Columbia Circuit explained:

> The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate most acutely the separation of powers, which the Supreme Court instructs, is the "single basic idea" on which the Article III standing requirement is built. *See Allen v. Wright*, [468 U.S. 737, 752 (1984)]; *Valley Forge Christian College* [*v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 472 (1982)]. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that "our system of government leaves . . . to the political processes." [*Schlesinger v.*] *Reservists to Stop the War*, [418 U.S. 208, 227 (1974)].

Id. This case simply does not raise the types of separation of powers concerns present in suits against the government. It involves a home buyer who actually paid a charge for a settlement service in a transaction that allegedly involved a kickback prohibited by Congress.[28] As a suit between private parties — the parties to the alleged kickback and the home buyer who paid for the service — it is "traditional grist for the judicial mill." *Id.*

---

28. *See* 12 U.S.C § 2607(d)(2).

CONCLUSION

Amici urge the Court to affirm the judgment below.

Respectfully submitted,

STEPHEN M. DANE
RELMAN, DANE
& COLFAX PLLC
1225 19th Street, NW
Suite 600
Washington, DC 20036

JOHN PAYTON
DEBO P. ADEGBILE
ELISE C. BODDIE
RYAN DOWNER
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street
16th Floor
New York, NY 10013

LESLIE PROLL
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
1444 I Street, NW
10th Floor
Washington, DC 20005
(202) 682-1300

JANELL M. BYRD
Counsel of Record
ZACHARY BEST
MEHRI & SKALET, PLLC
1250 Connecticut Ave., NW
Suite 300
Washington, DC 20036
(202) 822-5100
jbyrd@findjustice.com

JON M. GREENBAUM
JOSEPH D. RICH
JOHN K. DIPAOLO
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Ave., NW
Suite 400
Washington, DC 20005

MEGAN K. WHYTE
WASHINGTON LAWYERS'
COMMITTEE FOR CIVIL
RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
(202) 319-1000

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 24 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

No. 10-708

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE STATES OF MISSOURI, ALASKA, CALIFORNIA, HAWAII, ILLINOIS, IOWA, MISSISSIPPI, NEVADA, NEW MEXICO, WASHINGTON, AND WEST VIRGINIA, IN SUPPORT OF RESPONDENTS

CHRIS KOSTER
Attorney General of Missouri
JAMES R. LAYTON
SOLICITOR GENERAL
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (Facsimile)
James.Layton@ago.mo.gov

Additional Counsel on Inside Cover

JOHN J. BURNS
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811

KAMALA D. HARRIS
Attorney General of California
California Department of Justice
1300 I Street
P.O. 944255
Sacramento, California 94244-2550

DAVID M. LOUIE
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

LISA MADIGAN
Illinois Attorney General
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601

TOM MILLER
Attorney General of Iowa
Iowa Attorney General's Office
2nd floor, Hoover State Office Building
Des Moines, Iowa 50319

JIM HOOD
Mississippi Attorney General
Post Office Box 220
Jackson, Mississippi 39205

CATHERINE CORTEZ MASTO
Attorney General for the State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701

GARY K. KING
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street SE
PO Box 40100
Olympia, Washington 98504-0100

DARRELL V. MCGRAW, JR.
West Virginia Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

TABLE OF CONTENTS

TABLE OF AUTHORITIES 1

IDENTITY AND INTEREST OF AMICI CURIAE 3

ARGUMENT 4

CONCLUSION 13

APPENDIX A 14

APPENDIX B 17

TABLE OF AUTHORITIES

CASES

Bateman v. Am. Multi-Cinema, Inc.,
623 F.3d 708 (9th Cir. 2010) 8

Cooper v. QC Fin. Servs., Inc.,
503 F. Supp.2d 1266 (D. Ariz. 2007) 6

Feeney v. Dell Inc.,
908 N.E.2d 753 (Mass. 2009) 6

Gentry v. Superior Court,
165 P.3d 556 (Cal. 2007) 6

Kinkel v. Cingular Wireless LLC,
857 N.E.2d 250 (Ill. 2006) 6

Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998) 8

Murray v. GMAC Mortg. Corp.,
434 F.3d 948 (7th Cir. 2006) 7

Scott v. Cingular Wireless,
161 P.3d 1000 (Wash. 2007) 7

Ting v. AT&T,
182 F. Supp.2d 902 (N.D. Cal. 2002) 6

Vasquez-Lopez v. Beneficial Or., Inc.,
152 P.3d 940 (Or. App. 2007) 6

STATUTES

§ 407.020, Mo. Rev. Stat. (2000) 5

§ 407.100.4, Mo. Rev. Stat. (2000) 5

§ 407.100.6, Mo. Rev. Stat. (2000) 5

12 U.S.C. § 2607(a), (b) 8

12 U.S.C. § 2607(d)(4) (2006) 3

12 U.S.C. § 26907(d)(2) 8

OTHER AUTHORITIES

149 Cong. Rec. 26,891 (2003) 8

IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae, the attorneys general for the States of Missouri, Alaska, California, Hawaii, Illinois, Iowa, Mississippi, Nevada, New Mexico, Washington, and West Virginia, have enforcement authority under Section 8(d)(4) of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607(d)(4) (2006). As the chief law enforcement officers of their States, Amici have enforcement authority under myriad other federal and state laws – and a strong interest in seeing the continued enforcement of those laws, particularly those that protect consumers. Amici do not have the resources to litigate for all of their constituents all of the time, not even when statutory violations are most apparent. They depend on private litigation, of the sort at issue here, to aid them in enforcing consumer and other laws that protect the public.

ARGUMENT

This case arises from what has become increasingly common over the last century: a decision by a legislative branch to protect individuals by declaring a particular practice illegal. Legislators, including members of Congress, have never felt constrained to delay enforcement until particular persons appear who are able to prove direct economic harm from proscribed acts. Nor should they; the harm to individuals may be so subtle or so attenuated that such proof is essentially impossible, though the actual impact may be significant.

In that sense, efforts to regulate the financial services industry over the last three years may be a good example. With regard to practices that Congress has chosen or may choose to proscribe in order to deter a future economic crisis, there may be several – perhaps many – persons in the chain between the person who performed the act to be proscribed and the person who eventually suffered. It may be legally impossible or practically infeasible, for example, for a person whose home value plummeted because of a chain that began with the creation and sale of a discredited investment vehicle to bring suit against those who invented, sold, and profited from that vehicle.

When legislators see problems such as those that led to our current economic condition and decide to proscribe a particular act or practice, they must consider not just what to proscribe, but how to enforce the proscription. When legislators choose to make something a criminal offense, they use two tools: penal fines and restrictions on personal liberty

(imprisonment, parole, and probation). When legislators leave enforcement in the civil realm, they have a broader range of choices. Among those choices is the civil analog to criminal fines: civil monetary penalties.

Such penalties are sought and obtained by federal agencies, including the U.S. Department of Justice and the Federal Trade Commission. And they are sought and obtained by state officials, including attorneys general. Typically, those penalties are not tied to proven injuries to individuals. Rather, they are assessed based on violations of the law, regardless of whether there is proof of actual injury. For example, a court "may award to the state [of Missouri] a civil penalty of not more than one thousand dollars per violation" of Missouri's consumer protection law. § 407.100.6, Mo. Rev. Stat. (2000). Actual monetary damage is not a prerequisite (*see* § 407.020), and the penalties are paid in addition to any actual damages (§ 407.100.4).

The Missouri example is a traditional civil monetary penalty; the payment is sought by and made to the State. But legislators are not limited to such civil monetary penalties when creating enforcement mechanisms that are not restricted to proof of actual, measurable financial injury. Rather, they may include within a scheme what might be called "statutory damages" – amounts that are paid to individual plaintiffs whose statutory rights were violated. Such "statutory damages" have become common in federal law. *See* Appendix A.

Legislators – and even courts – may prefer that civil monetary penalties or "statutory damages" be

sought by and paid to governments. But in the current economic environment, there is a significant limit on the legislators' ability or willingness to restrict enforcement to government action: the ability or willingness of legislators to fund the efforts of those agencies. The ability of state and federal agencies to pursue enforcement of proscriptions enacted by the legislative branch has been, and continues to be, significantly constrained by declining budgets.

In the "statutory damages" statutes, Congress and state legislatures have, in essence, created systems of dual public-private enforcement – and courts have repeatedly recognized the importance of the private role in ensuring that rights created by law are vindicated.[1] The steps to creation begin with

---

[1] *E.g.*, *Feeney v. Dell Inc.*, 908 N.E.2d 753, 764 (Mass. 2009) (as purposes of Massachusetts's consumer-protection statute reflect, "availability of the Attorney General's enforcement authority is . . . not sufficient to ensure that the goals of the statute are realized"); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp.2d 1266, 1289 (D. Ariz. 2007) ("The mere possibility that a state agency may at some time file an enforcement action should not preclude Plaintiff and other similarly situated consumers from seeking a legal remedy . . . ."); *Ting v. A T&T*, 182 F. Supp.2d 902, 920 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F.3d 1126 (9th Cir. 2003) (rejecting argument that FCC is forum before which class members can "effectively vindicate" right to recover damages from AT&T); *Gentry v. Superior Court*, 165 P.3d 556, 569 (Cal. 2007) (rejecting argument that availability of enforcement by Labor Commissioner is "adequate substitute for classwide arbitration"); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 276 (Ill. 2006) (state attorney general's authority to bring action insufficient, given office's need to allocate "scarce resources to a variety of issues affecting consumers"); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940, 950 (Or. App. 2007) ("possibility of state action cannot reliably serve as a substitute for private actions," given attorney general's contention that

enactment of a private cause of action, but also include provision for payments by violators to plaintiffs.

Such financial incentives are required, of course, if the private role is to have meaning. They are particularly important where the amount that an individual plaintiff may recover, if limited to her actual damages caused by a particular practice, is small or difficult to prove. The Ninth Circuit explained that in the context of a case involving a claim under the Fair and Accurate Credit Transactions Act ("FACTA"):

> The need for statutory damages to compensate victims is plain. The actual harm that a willful violation of FACTA will inflict on a consumer will often be small or difficult to prove. As the Seventh Circuit similarly noted in *Murray*, under the [Fair Credit Reporting Act] "individual losses, if any, are likely to be small–a modest concern about privacy, a slight chance that information would leak out and lead to identity theft. That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury." [*Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006)].

---

amount of consumer fraud in state "far exceeds" ability to investigate and prosecute it); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (noting declaration by consumer-protection chief that attorney general's office lacked "sufficient resources to respond to many individual cases" and often relied on private class actions).

> In addition to that compensatory function, FACTA's actual and statutory damages provisions also effectuate the Act's deterrent purpose. *See* [*Los Angeles News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998)] (noting that statutory damages help "sanction and vindicate the statutory policy of discouraging infringement" (internal quotation marks omitted)). In fashioning FACTA, Congress aimed to "restrict the amount of information available to identity thieves." 149 Cong. Rec. 26,891 (2003) (statement of Sen. Shelby). Allowing consumers to recover statutory damages furthers this purpose by deterring businesses from willfully making consumer financial data available, even where no actual harm results.

Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708, 718 (9th Cir. 2010).

In terms of encouraging private plaintiffs to pursue their statutory rights, the Real Estate Settlement Procedures Act ("RESPA") works the same way as FACTA. In RESPA, Congress barred certain referral fees and kickbacks (12 U.S.C. § 2607(a), (b)), practices that Congress deemed likely to cause injury to many consumers. And Congress did not just authorize government enforcement of that ban; it gave individuals in the real estate market an incentive to enforce it as well: RESPA imposes on those who violate the ban liability for "an amount equal to three times the amount of any charge paid for ... settlement service," payable to the person who purchased the "settlement service." 12 U.S.C. § 26907(d)(2).

Congress enacted its scheme, including the private enforcement mechanism, not because any particular purchaser of real estate might suffer dramatically – or even measurably – because of a kickback or rebate. Rather, Congress recognized that certain practices naturally tend to affect consumers across the country, perhaps eventually harming all purchasers, and took steps to end the practice regardless of whether particular individuals can prove personal economic harm.

In someone's ideal world, perhaps, Congress would have provided enforcement agencies sufficient resources to identify and pursue every kickback and every referral fee. But we do not live in that world. Instead, we live in a world of scarce government resources. So Congress included "statutory damages" – enlisting private citizens to enforce their own statutorily created rights rather than waiting for the government to protect them. Again, Congress imposed on those engaging in illegal practices liability to private plaintiffs – here, to those whose real estate purchases include payment for settlement services in which persons engaged in the banned actions. The ability of an individual to recover under RESPA is not tied to being able to prove that she paid more than what she might have paid without the kickback or referral fee. The individual is simply authorized to recover from the lawbreaker based on the violation of her statutory rights.

Petitioners make no claim that the government cannot prosecute a case in federal court for violation of a statute unless the government proves that a measurable injury results from that violation. Petitioners instead question whether a private

plaintiff may bring such a suit or bring a suit to vindicate her own statutory right. In Petitioners' view, a live dispute among these private parties, each of whom had a role in a real estate transaction and has a direct monetary stake in the result of this suit, is not enough to create a "case or controversy" such as to allow federal court jurisdiction. At a somewhat superficial level, at least, that position seems absurd: the Constitution requires a real, currently-active dispute between the parties; the plaintiffs claim to be entitled to money from the defendants under RESPA for violation of their rights; and the defendants deny that liability; hence there is a live controversy.

We do not file as amici, however, to address the real meaning of "injury" in the language used by this Court in its standing jurisprudence. Nor do we address the petitioners' insistence that some proven economic "injury" is constitutionally required before a live dispute can be brought to federal court – insistence that seems to have no logical basis in the "case or controversy" concept. Rather, we file because of our desire to ensure that when this Court addresses whether federal courts can hear claims by individuals seeking monetary amounts promised under a statute, it keeps two things in mind.

First, private enforcement is an even more important part of the regulatory scheme now than it was just a few years ago. Restricting the ability of Congress to use the private "statutory damages" technique for ensuring compliance with the law would, in this era of decreasing government resources, diminish protection from the ills that statutes such as RESPA were enacted to address. Congress, by providing for payments to individuals

based not on proven economic harm but on violations of statutory rights, deliberately gave individuals the incentive and tools to parallel the government's enforcement efforts. To deprive plaintiffs, such as those who brought this case, the ability to sue in federal court would blunt, if not destroy, the private enforcement tool. In good economic times, Congress might respond by beefing up federal enforcement efforts. But as Congress cuts budgets for federal enforcement agencies, it becomes increasingly difficult for those agencies to themselves enforce the legislative will. There is little hope that in the short term, that situation will change.

During the last two decades, there have been times, of course, when federal resources have been redirected from enforcement of consumer protection statutes like RESPA, and the states, through their attorneys general, have picked up part of the slack. But that cannot happen this time. State budgets are even more constrained than the federal budget. As legislatures reduce appropriations for attorneys general, statutorily mandated functions – such as prosecutions, appeals in criminal cases, and defending the state in civil cases – must come first. Consumer protection is often a discretionary area – very, very valuable to citizens in the short- and long-term, but not absolutely essential to the functioning of state government and the criminal justice system. Today, it is simply not possible for attorneys general, individually nor collectively, to make up for new federal enforcement deficiencies.

Second, this Court's decision may have a ripple effect beyond federal courts and federal statutes. Declaring that there is no constitutionally sufficient "case or controversy" when an individual seeks

through federal court litigation a monetary amount that Congress has authorized that individual to obtain for violation of her statutory rights could affect the ability not just of private citizens but of attorneys general to use even state courts to protect their citizens. We recognize that this Court's decisions concerning federal court jurisdiction are not directly binding on state court systems. But they are treated as if they were binding in some states, and are persuasive authorities in others. *See* Appendix B. Though attorneys general sometimes invoke federal jurisdiction to enforce laws that protect their constituents as consumers or otherwise, they rely regularly on state court jurisdiction to enforce consumer protection and other remedial laws. Were state courts to follow a lead by this Court and carve out from their jurisdiction cases in which attorneys general or private plaintiffs seek to enforce civil monetary obligations without proof of direct individual harm, the ability of the states to protect their citizens could be severely hurt.

The petitioners' proposed interpretation of the "case or controversy" requirement could have a severe adverse impact on protections for American consumers and the American economy. And it would do so by removing from federal court jurisdiction – and perhaps, by derivation, from state court jurisdiction – cases in which everyone recognizes that there is a live controversy among parties with a direct personal stake in the outcome. The Constitution of the United States simply does not require that result.

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

CHRIS KOSTER
Attorney General of Missouri

JAMES R. LAYTON
SOLICITOR GENERAL
Counsel of Record
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-0774 (Facsimile)
James.Layton@ago.mo.gov

October 18, 2011

APPENDIX A

EXAMPLES OF FEDERAL "STATUTORY DAMAGES" PROVISIONS

The Copyright Act, 17 U.S.C. § 504(c). *See Bus. Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 403 (2d Cir. 1989) (noting that statutory damages are an appropriate remedy in the absence of proof of actual damages). *See also Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984); *Engel v. Wild Oats, Inc.*, 644 F. Supp. 1089, 1091 (S.D.N.Y. 1986); *Reader's Digest Ass'n, Inc. v. Conservative Digest, Inc.*, 642 F. Supp. 144 (D.D.C. 1986) *aff'd*, 821 F.2d 800 (D.C. Cir. 1987).

Fair and Accurate Credit Transactions Act of 2003, 15 U.S.C. § 1681n(a). *See Murray*, 434 F.3d at 952-53 (holding individual damages issues did not preclude class certification because the class representative could seek statutory damages "without proof of injury" in lieu of actual damages); *Ashby v. Farmers Ins. Co. of Or.*, No. CV 01-1446-BR, 2004 WL 2359968, at *5 (D. Or. Oct. 18, 2004) (holding that no "actual harm" need be proved in an action under § 1681m(a) because "Congress ... has stated in plain terms that statutory damages are available as an alternative remedy to actual damages"); *Accord Gillespie v. Equifax Info. Servs.*, No. 05 C 138, 2008 WL 4614327, at *7 (N.D. Ill. Oct. 15, 2008) (relying on the same reasoning in determining that class treatment was appropriate for a violation of § 1681g(a)(1)'s disclosure requirements); *Murray v. New Cingular Wireless Services, Inc.*, 232 F.R.D. 295, 302-03 (N.D. Ill. 2005)

(reaching a similar conclusion with respect to a FCRA claim premised on a violation of § 1681b(e)); *see also, Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 705-707 (6th Cir. 2009) *cert. denied*, 130 S. Ct. 2379, 176 L. Ed. 2d 768 (U.S. 2010).

Fair Debt Collection Practices Act of 1978, 15 U.S.C. § 1692k(a). *See Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) ("a consumer may recover statutory damages if the debt collector violates the FDCPA even if the consumer suffered no actual damages"); *see also Robey v. Shapiro, Marianos & Cejda*, L.L.C., 434 F.3d 1208, 1212 (10th Cir. 2006).

Truth in Lending Act of 1968, 15 U.S.C. § 1640(a)(2)(A). *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (holding that a consumer did not need to show that she "suffered actual monetary damages" or that she "was actually misled or deceived" in order to prevail on a TILA claim for statutory damages and attorney's fees); *accord Edwards v. Your Credit Inc.*, 148 F.3d 427, 441 (5th Cir. 1998); *see also McGowan v. King, Inc.*, 569 F.2d 845, 849 (5th Cir. 1978).

The Wiretap Act, 18 U.S.C. § 2510 et seq. *See Apampa v. Layng*, 157 F.3d 1103, 1105 (7th Cir. 1998) (because the statute permits the recovery of "actual damages ... or statutory damages of not less than $50 and not more than $500," 18 U.S.C. § 2520(c)(1)(A), "the plaintiff need not prove any actual harm.").

Stored Communications Act, 18 U.S.C. §§ 2701-2712. *See Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 427-428 (S.D.N.Y. 2010) (finding, where plaintiffs

expressly waived any claim of actual damages or "harm" under SCA, they were nonetheless entitled to statutory damages for SCA violations); *but see, Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 204-06 (4th Cir. 2009) (plain text of SCA required proof of actual damages as prerequisite to recovering statutory damages).

Driver's Privacy Protection Act, 18 U.S.C. § 2724(b). *See Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209, 1217 (11th Cir. 2005) (plaintiff could recover statutory damages notwithstanding the plaintiff's failure to show any actual damages resulting from the violation).

Agricultural Workers Protection Act, 29 U.S.C. § 1854(c)(1). *See Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (affirming award of statutory damages to the plaintiffs in the face of the "uncertain damage each may have suffered from the particular violation").

APPENDIX B

States that follow the Court's doctrine:

Alabama, *see Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.*, 890 So. 2d 70 (Ala. 2003), *quoting Lujan*, 504 U.S. at 560-61 (To show standing, a party must show "(1) an ... 'injury in fact' ...; (2) a 'causal connection between the injury and the conduct complained of'; and (3) a likelihood that the injury will be 'redressed by a favorable decision.'").

Arizona, *see McComb v. Superior Court In & For County of Maricopa*, 189 Ariz. 518, 943 P.2d 878, 882 (Ct. App. 1997) (citing *Lujan*).

California, *see Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 246 P.3d 877, 886 (2011) (Prop.64, § 1, subd. (e) ["It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution."].

Delaware, *see Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (Delaware test for standing is derived from the United States Supreme Court case of *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970)).

Florida, *see State v. J.P.*, 907 So. 2d 1101, 1113 n.4 (Fla. 2004) (relying on federal authority in defining three requirements that constitute the "irreducible constitutional minimum" for standing).

Georgia, *see Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 651 S.E.2d 36, 38 (2007) ("In the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts.").

Idaho, *see Boundary Backpackers v. Boundary County*, 128 Idaho 371, 913 P.2d 1141, 1154 (1996) (following *Lujan* and a host of other federal authorities).

Illinois, *see Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 524 N.E.2d 561, 574 (1988) (observing that court was not required to follow federal law on issues of justiciability and standing, but adopting test based on federal precedent).

Indiana, *see Smith v. Brendonwood Common, Inc.*, 949 N.E.2d 422, 424 (Ind. Ct. App. 2011) (To determine whether a person is "injured" for the purposes of standing, we apply the [*Lujan*] test).

Iowa, *see Godfrey v. State*, 752 N.W.2d 413, 419 (Iowa 2008) (The two-prong Iowa test parallels the landmark test established in *Ass'n of Data Processing Serv. Organizations, Inc.*).

Kansas, *see Harrison By & Through Harrison v. Long*, 241 Kan. 174, 734 P.2d 1155, 1158 (1987) (relying on federal precedent in defining standing under state law).

Massachusetts, *see Wigfall v. Goncalves*, No. 9406510F, 1998 WL 1184196 (Mass. Super. Jan. 14, 1998) (acknowledging that Article III does not apply to state courts, but observing "Massachusetts courts do generally adopt the requirement that actual

injury be present in order for a litigant to have his day in court"); *Johnson v. Martha's Vineyard Comm'n*, No. 941243, 1996 WL 1185088 (Mass. Super. May 17, 1996) (The constitutional requirement embodies the three common standing elements required by the Supreme Court under Article III of the Constitution).

Minnesota, *see Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007) (relying on federal precedent in describing standing requirements in state court).

Mississippi, *see Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 154-55 (Miss. 2011) (applying *Lujan* in evaluating standing in state court).

Missouri, *see Ste. Genevieve Sch. Dist. R II v. Bd. of Aldermen of City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. 2002) (applying federal law in describing requirements for standing in Missouri courts).

Montana, *see Druffel v. Bd. of Adjustment*, 339 Mont. 57, 60, 168 P.3d 640, 643 (2007) ("the concept of standing arises from two different doctrines: first, discretionary doctrines intended to manage judicial review of the legality of public acts and, second, constitutional doctrines drawn from Article III of the United States Constitution.").

Nebraska, *see State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921, 926 (1993) (observing "While not a constitutional prerequisite for jurisdiction of courts of the State of Nebraska ... existence of an actual case or controversy, nevertheless, is necessary for the exercise of judicial power in Nebraska" and applying some federal precedent).

Nevada, *see In re Amerco Derivative Litig.*, 252 P.3d 681, 694 (Nev. 2011) *quoting Doe v. Bryan*, 102 Nev. 523, 728 P.2d 443, 444 (1986) ("Although state courts do not have constitutional Article III standing, 'Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.'").

New York, *see Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 573 N.E.2d 1034, 1040 (1991) (noting there is no state law analogue to Article III, but still looking to federal precedent because common law also requires injury in fact).

North Carolina, *see Teague v. Bayer AG*, 195 N.C. App. 18, 671 S.E.2d 550, 554 (2009) ("Although North Carolina courts are not bound by the 'case or controversy' requirement of the United States Constitution with respect to the jurisdiction of federal courts, similar 'standing' requirements apply 'to refer generally to a party's right to have a court decide the merits of a dispute.'") (internal citations omitted).

North Dakota, *see State v. Carpenter*, 301 N.W.2d 106, 107 (N.D. 1980) (relying entirely on federal law in assessing standing).

Ohio, *see Brinkman v. Miami University*, 2007 WL 2410390, *8 n. 5 (Ohio App. 12 Dist. Aug. 27 2007) *quoting* Solimine, Recalibrating Justiciability in Ohio Courts, 51 Cleve.St.L.Rev. at 541 ("We recognize, of course, that federal decisions on the issue of standing are not binding on Ohio state courts. Nevertheless, 'Ohio courts have long adopted, voluntarily, federal standing requirements.'") (internal citation omitted).

Oklahoma, *see Toxic Waste Impact Group, Inc. v. Leavitt*, 890 P.2d 906, 910 n.7 (Okla. 1994) ("Federal court jurisprudence articulating standards for standing pursuant to Art. III of the United States Constitution do not necessarily define standing pursuant to Art. VII of the Oklahoma Constitution. However, in that our standing standards are analogous to those pronounced by the United States Supreme Court its jurisprudence on the subject is instructive.").

Rhode Island, *see McKenna v. Williams*, 874 A.2d 217, 225 (R.I. 2005) (adopting own rules based on federal precedent).

South Carolina, *see ATC S., Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008) (applies federal Art. III standing test to litigant in state court).

South Dakota, *see Arnoldy v. Mahoney*, 791 N.W.2d 645, 653 (S.D. 2010) ("Standing is established through being a 'real party in interest' and is controlled by statute. SDCL 15-6-17(a) provides that '[e]very action shall be prosecuted in the name of the real party in interest.' 'The real party in interest requirement for standing is satisfied if the litigant can show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'"), *But see Cable v. Union County Bd. of County Com'rs*, 769 N.W.2d 817, 825-26 (S.D. 2009) (applying 3-part federal *Lujan* test to assess standing).

Tennessee, *see Am. Civil Liberties Union of Tennessee v. Darnell*, 195 S.W.3d 612, 619-20 (Tenn.

2006) (applying federal precedent in analyzing standing in state court).

Texas, *see Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (in assessing the "distinct injury" and "controversy" requirements for standing under Texas law, holding "To guide our decision on this issue of first impression for Texas, we may look to the similar federal standing requirements for guidance.").

Utah, *see Brown v. Div. of Water Rights of Dep't of Nat. Res.*, 228 P.3d 747, 750-51 (Utah 2010) ("Accordingly, in Utah, as in the federal system, standing is a jurisdictional requirement.").

Vermont, *see Parker v. Town of Milton*, 169 Vt. 74, 726 A.2d 477, 480 (1998) ("The standing requirement originates in Article III of the United States Constitution, which states that federal courts have jurisdiction only over actual cases or controversies... This requirement has been adopted in Vermont.").

Virginia, *see Chesapeake Bay Found., Inc. v. Com. ex rel. Virginia State Water Control Bd.*, 56 Va. App. 546, 695 S.E.2d 549, 552-53 (2010) (following federal precedent (*Lujan*) regarding Article III standing in assessing standing in state action).

Washington, *see State v. Wise*, 148 Wash. App. 425, 200 P.3d 266, 274 (2009) (following Article III standing analysis/precedent in analyzing standing under state constitution).

West Virginia, *see Coleman v. Sopher*, 459 S.E.2d 367, 373 n.6 (W. Va. 1995) (following federal

precedent under Article III to assess "controversy" requirement for standing under state constitution).

Wyoming, *see Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 318 (Wyo. 1980) (in developing its own standing rules, court looks to the law of other states as well as federal cases).

States that decline to follow the Court's doctrine:

Alaska, *see Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 987 (Alaska 2008) ("The United States Supreme Court, however, has interpreted the federal constitution to limit standing in a way that Alaska's constitution does not.").

Arkansas, *see Chubb Lloyds Ins. Co. v. Miller County Cir. Ct.*, 2010 Ark. 119, --- S.W.3d ----, 2010 WL 841254 (2010) ("Arkansas, however, has not followed the federal analysis and definition of 'justiciability' to include standing as a matter of subject-matter jurisdiction.").

Colorado, *see Grand Valley Citizens' Alliance v. Colorado Oil & Gas Conservation Comm'n*, No. 09CA1195, 2010 WL 2521747 (Colo. Ct. App. June 24, 2010) *cert. granted*, No. 10SC532, 2011 WL 976732 (Colo. Mar. 21, 2011) (Colorado "does not require" as much as federal cases require. Accordingly, "the test in Colorado has traditionally been relatively easy to satisfy.").

Connecticut, *see Andross v. Town of W. Hartford*, 285 Conn. 309, 939 A.2d 1146, 1158 (2008) ("This court has recognized, however, that '[w]e are not required to apply federal precedent in determining the issue of aggrievement.'").

Hawaii, *see Citizens for Prot. of N. Kohala Coastline v. County of Hawai'i*, 979 P.2d 1120, 1127 (Haw. 1999) ("the United States Supreme Court's doctrine on the issue of standing does not bind us."), *But see Corboy v. Louie*, 30049, No. 30049, 2011 WL 1687364 (Haw. Apr. 27, 2011), *reconsideration denied*, 251 P.3d 601 (Haw. 2011) ("Because this court is not bound by the same 'cases or controversies' limitation as the federal courts, federal cases concerning standing are not dispositive on this issue. Nevertheless, the Ninth Circuit Court of Appeals' analysis in *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003), is persuasive.").

Kentucky, *see HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985) (developing state standing rules without looking to any federal precedent).

Louisiana, *see Louisiana Indep. Auto Dealers Ass'n v. State*, 295 So. 2d 796, 799 (La. 1974) (noting that Louisiana constitution contains no equivalent to Article III and therefore that "the federal decisions should be considered persuasive to the extent that they recognize 'justiciability', but are not necessarily limitations on the jurisdiction of the state courts.").

Maine, *see Seven Islands Land Co. v. Me. Land Use Regulation Comm'n*, 450 A.2d 475, 484 n.5 (Me. 1982) (in this case (and others), court adopts its own test for standing and observes "The doctrine of 'standing to sue' in the federal courts has its own unique significance, often requiring consideration of whether there is a justiciable controversy within the meaning of Article III, Section 2, of the United States Constitution.").

Maryland, *see Nefedro v. Montgomery County*, 414 Md. 585, 996 A.2d 850, 854 (2010) (refusing to apply three-prong federal test from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), holding "[t]hat test sets forth the prudential requirements for standing in federal court, but it is not applicable to state courts.").

Michigan, *see Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 487 Mich. 349, 792 N.W.2d 686, 695 (2010) (Federal case or controversy standing requirement does not apply in Michigan; Michigan's power to decide controversies is broader than the United States Supreme Court's interpretation of Article III case or controversy limits on federal judicial power because a state sovereign possesses inherent powers that the federal government does not).

New Hampshire, *see Asmussen v. Comm'r, New Hampshire Dept. of Safety*, 145 N.H. 578, 587, 766 A.2d 678, 689 (2000) (develops own rules without citation to federal precedent).

New Jersey, *see Salorio v. Glaser*, 82 N.J. 482, 490-491, 414 A.2d 943, 947 (1980) ("It is important to recognize that New Jersey State courts are not bound by the 'case or controversy' requirement governing federal courts..."); *Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York*, 58 N.J. 98, 275 A.2d 433 (1971) ("Our State Constitution contains no analogous provision limiting the subject-matter jurisdiction of the Superior Court. See N.J. Const. art. VI, § 3, ¶ 2 . This Court remains free to fashion its own law of standing consistent with notions of substantial justice and sound judicial administration. We therefore find it unnecessary to

consider whether federal standing requirements have been met.").

New Mexico, *see San Juan Agr. Water Users Ass'n v. KNME-TV*, 257 P.3d 884, 893 (N.M. 2011) *quoting ACLU of New Mexico v. City of Albuquerque*, No. 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222 (2008) ("Unlike the federal courts, 'New Mexico state courts are not subject to the jurisdictional limitations imposed on federal courts by Article III, Section 2 of the United States Constitution.'").

Oregon, *see Kellas v. Dep't of Corr.*, 341 Or. 471, 145 P.3d 139, 143 (2006) ("...we cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government.").

Pennsylvania, *see Johnson v. Am. Standard*, 607 Pa. 492 (2010) ("While standing in a federal court is derived from the United States Constitution, the same is not true in Pennsylvania, as the Pennsylvania Constitution contains no reciprocal Article III requirement. Rather, and as will be explained in greater detail infra, Pennsylvania courts have consistently required a 'substantial, direct, and immediate' interest in the outcome of litigation to obtain standing.").

Wisconsin, *see Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 797 N.W.2d 789, 798 (Wis. 2011) ("Standing in Wisconsin is not to be construed narrowly or restrictively, but rather should be construed liberally." Wisconsin courts assess standing as a matter of judicial policy rather

than a jurisdictional prerequisite ala the federal courts).

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-708

In The Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION SUPPORTING PETITIONERS

NICK CAMMAROTA
California Building Industry Association
1215 K Street, Suite 1200
Sacramento, CA 95814
(916) 443-7933
ncammarota@cbia.org

CHRISTOPHER M. WHITCOMB*
THOMAS J. WARD
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
cwhitcomb@nahb.org
Counsel of Record

August 29, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

QUESTION PRESENTED

In the absence of any claim that the alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF APPENDICES iii
TABLE OF AUTHORITIES iv
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 3
ARGUMENT 4
I. Article III Standing Requirements Are Not Obviated By Congressionally Created Interests or Rights 4
A. Congressionally Created Rights Still Require Injury in Fact 5
B. A Statutory Cause of Action Does Not Confer Standing Without Specific Proof of Injury 7
CONCLUSION 10

TABLE OF APPENDICES

Page(s)

List of NAHB *Amicus Curiae* cases.....App. 1

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Elec. Power Co., Inc., et al. v. State of Connecticut, et al., 131 S. Ct. 2527 (2011) 2

Edwards v. First Am. Corp., 610 F.3d 514 (9th Cir. 2010) 5

Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 Fed. Appx. 469 (6th Cir. 2006), *cert denied*, 128 S. Ct. 880 (2008) (No. 07-421) 2

Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc., 528 U.S. 167 (2000) 8

Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979) 6-7

Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 399 F.3d 248 (3d Cir. 2005) 8

Joint Stock Soc'y v. UDV North America, Inc., 266 F.3d 164 (3d Cir. 2001) 9

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4, 5, 8

NAHB v. Defenders of Wildlife, 551 U.S. 644 (2007) 2

Raines v. Byrd, 521 U.S. 811 (1997) 5

Sierra Club v. Morton, 405 U.S. 727 (1972) 7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 7

TABLE OF AUTHORITIES *(cont.)*

Page(s)

Summers v. Earth Island Inst., et al., 129 S. Ct. 1142 (2009) 5

Texas Indep. Producers and Royalty Owners Ass'n, et al. v. E.P.A., 410 F.3d 964 (7th Cir. 2005) 8-9

Warth v. Seldin, 422 U.S. 490 (1975) 5, 6

Zivotofsky v. Sec'y of State, 444 F.3d 614 (D.C. Cir. 2006) 7

CONSTITUTIONAL, REGULATORY AND STATUTORY PROVISIONS

15 U.S.C. § 1120 9

33 U.S.C. §§ 1365 (a) 8

33 U.S.C. §§ 1365 (g) 8

OTHER

Richard D. Freer Et Al., *Jurisdiction and Related Matters*, 13A Fed. Prac. & Proc. Juris. § 3531.4 (3d ed. 2011) 4

Laurence H. Tribe, *American Constitutional Law* 396 (3d Ed. 2000) 3

INTEREST OF *AMICUS CURIAE*

Blanket consents are on file for the submission of amicus briefs in this matter.[1]

The National Association of Homebuilders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders and remodelers, and its builder members construct about 80 percent of the new homes each year in the United States. The California Building Industry Association ("CBIA") is a statewide, non-profit trade association representing approximately 3,200 businesses involved in all aspects of residential and commercial construction. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors, lenders, attorneys, land planners, material suppliers, insurers and land developers.

---

[1] Under Rule 37.6 of the Rules of this Court, *Amicus* state(s) that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus*, its members, or its counsel contributed monetarily to the preparation and submission of this brief. Letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

Collectively, the members are responsible for producing approximately 70% of all new homes built in California annually. First American Financial Corporation is a member of both the CBIA and NAHB.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). It also has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

The maintenance and clarification of Article III's injury in fact requirement has long been of critical importance to NAHB and the CBIA as our members frequently face lawsuits alleging the violation of federal statutory rights. Because these lawsuits often turn on standing, both NAHB and the CBIA are keenly interested in clarification of the injury in fact requirement impacted in these lawsuits. Toward that end, NAHB has participated in cases before the Court that implicate similar standing issues, including *Am. Elec. Power Co., Inc., et al. v. Connecticut, et al.*, 131 S. Ct. 2527 (2011) and *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469 (6th Cir. 2006), *cert. denied*, 128 S. Ct. 880 (2008) (No. 07-421).

Finally, many CBIA and NAHB members are covered by the Real Estate Settlement Procedures Act (RESPA). Thus, they have a direct interest in the degree to which Private Enforcement of the statute will be allowed by Federal Courts.

SUMMARY OF ARGUMENT

The ability of Congress to grant a private plaintiff a statutory right of action in federal courts is always subject to the full limits of Article III. Lower courts have been frequently confused by the distinction between a statutory right of action and the existence of the injury required for standing under the constitution, and this case provides an excellent opportunity to clarify how these separate elements of standing relate to each other and are to be applied.

> Article III is a constraint upon *congressionally conferred*, as well as *judicially inferred*, standing, and that Congress may not bestow standing to sue except where the courts would otherwise find that the basic requirements for 'injury in fact' are already met.

Laurence H. Tribe, *American Constitutional Law* 396 (3d Ed. 2000).

Accordingly, the fact that a statute creates a private right of action, does not mean that an injury in fact "automatically" occurs upon violation of the statute. Under such circumstances, affirmative proof that the *plaintiff* suffered a distinct and

palpable injury is required. This proof is especially important when the plaintiff alleges that it has suffered an injury due to a regulated party's violation of statutory requirements and prohibitions.

ARGUMENT

I. Article III Standing Requirements Are Not Obviated By Congressionally Created Interests or Rights

All parties must satisfy Article III requirements for standing in order to have a case or controversy before a federal court. "First, the plaintiff must have suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical' . . . Second, there must be a causal connection between the injury and the conduct complained of . . . [t]hird, it must be 'likely' . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). While these concepts blend together, "the central focus is fixed on the injury requirement." Richard D. Freer Et Al., *Jurisdiction and Related Matters*, 13A Fed. Prac. & Proc. Juris. Section 3531.4 (3d ed. 2011).

While the paramount need for a concrete and particularized injury has been well established, courts continue to be confused over its application in the context of rights and causes of actions created by statute. This case is an excellent platform for this Court to resolve lingering inconsistencies in the lower courts.

There is a clear distinction between the violation of a congressionally created right and the existence of an injury under Article III. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n. 3 (1997).

While Congress can create legal rights through statute, no statute can manufacture a one-size-fits-all injury. The need for all plaintiffs to show a concrete and particularized injury is well established. *Lujan*, 504 U.S. at 581 (". . . the party bringing suit must show that the action injures him in a concrete and personal way."). In other words, the fact that a statute has conferred the right to sue on a particular party does not create standing out of whole cloth. "[T]he requirement of injury in fact is a hard floor of Art. III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst., et al.*, 129 S. Ct. 1142, 1151 (2009).

A. Congressionally Created Rights Still Require Injury in Fact

In the decision below, the Ninth Circuit inappropriately conflates the statutory creation of a right of action with the injury required by Article III. The Ninth Circuit determined that the injury required by Article III exists by virtue of statutes creating legal rights. *See Edwards v. First Am. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The court

concludes that "[b]ecause RESPA gives Plaintiff a statutory cause of action, we hold that plaintiff has standing to pursue her claims against Defendants." *Id.* at 518. This conclusion, however, misreads this Court's past decisions dealing with injury in fact in the context of statutorily created rights.

While the Court in *Warth* articulated the principle that an injury in fact can exist because of the violation of a statutorily created right, it never eliminated the requirement that an injury be concrete and particularized under Article III. *Warth* clearly states that the standing analysis occurs in two parts. First, when a statute creates a legal right or a cause of action, the violation of that right can provide the basis for a legally cognizable injury. The Court continued to explain that "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." 422 U.S. at 501.

In fact, only prudential standing requirements were limited by the Court's holding in *Warth*. These requirements are meant "to avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 99-100 (1979). Where Congress intended to confer standing to the extent of Article III, these prudential barriers to standing do not apply. "If, as is demonstrated in the text, Congress intended standing under [the statute] to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury . . . " *Gladstone Realtors,* 441

U.S. at 103 n.9 (emphasis in original). In other words, the requirement of a concrete and particularized injury remains sacrosanct.

B. A Statutory Cause of Action Does Not Confer Standing Without Specific Proof of Injury

The creation of a statutory cause of action is unrelated to proof of injury in fact, which is the threshold question before a plaintiff can assert any claim under the statute. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). However, statutes that do not confer an individual right must be supported by clear evidence of injury that has personally affected the plaintiff. *See Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

The District of Columbia Circuit recently recognized this distinction in *Zivotofsky v. Sec'y of State*, 444 F.3d 614 (DC Cir. 2006). Citing *Warth*, the court noted that when congress enacts statutes that unequivocally create legal rights, the violation of those rights will create standing upon specific proof of injury. *Id.* at 617. The court then explained that even where statutes create a clear individual right, the plaintiff must show how a violation of that right has created a concrete and particular injury. *Id.* at 618-19.

This analysis can also be seen in the context of statutes with citizen-suit provisions. Under these circumstances, Article III standing requires a specific showing of how the statutory violation has harmed a plaintiff in "a concrete and personal way." *Lujan*, 504 U.S. at 580-81.

Examples of the proof required can be found in the context of environmental statutes with citizen suit provisions. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000). The issue in *Laidlaw* arose under the citizen suit provision of the Clean Water Act, which authorizes federal district courts to review suits initiated by "a person . . . having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365 (a), (g). Under *Laidlaw*, the Court explained that plaintiffs utilizing a statute's citizen suit provision must clearly show that injury complained of was concrete and particularized. *Id.* at 180-81.

Alleging a violation of the statute alone was insufficient to show injury in fact. The plaintiff in *Laidlaw* had to make an affirmative showing that the regulated party's actions had an adverse affect on its interests. *See also Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 255-56 (3d Cir. 2005) (plaintiffs proved particularized injury under citizen suit provision of the Resource Conservation and Recovery Act). By contrast, where citizen suit claimants have failed to show that the manner in which another is regulated will cause a direct and quantifiable injury, they do not have standing under Article III. *See Texas Indep. Producers and Royalty*

Owners Ass'n, et al. v. E.P.A., 410 F.3d 964, 971 (7th Cir. 2005).

Similarly, the Third Circuit recently applied this principle in the context of the Lanham Act, which imposes civil liability for damages sustained by a person injured as a result of the procurement of the registration of a mark by a false or fraudulent declaration. *Joint Stock Soc'y v. UDV North America, Inc.*, 266 F.3d 164 (3d Cir. 2001); 15 U.S.C. § 1120. The court determined that the plaintiffs did not show Article III standing because no evidence was presented that they lost business because of the false use of its trademark, the court held that they did not show an injury in fact sufficient for standing. *Id.* at 176.

The facts and posture of *Joint Stock Soc'y* are strikingly similar to those in the case below. As the Ninth Circuit noted, Section 8(d) of RESPA grants a statutory cause of action when a plaintiff has purchased a settlement service "involved in" a regulated party's violation of the statute. What the Ninth Circuit ignored is that plaintiff must still plead with particularity how the claimed violation of Section 8(a) of RESPA actually injured her.

Thus, Ms. Edwards was required to show a distinct injury in addition to claiming a violation of RESPA. While RESPA creates a specific cause of action, a violation of its provisions does not necessarily result in an injury. Like plaintiffs exercising their statutory cause of action under an environmental citizen suit provision or the Lanham

Act, the plaintiff here must plead distinct and particularized injury stemming from First American's actions.

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

NICK CAMMAROTA
California Building
Industry Association
1215 K Street,
Suite 1200
Sacramento, CA 95814
(916) 443-7933
ncammarota@cbia.org

CHRISTOPHER M. WHITCOMB*
THOMAS J. WARD
National Association
of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
cwhitcomb@nahb.org
**Counsel of Record*

August 29, 2011

APPENDIX

TABLE OF APPENDICES

Page(s)

List of NAHB *Amicus Curiae* cases.....App. 1

APPENDIX A

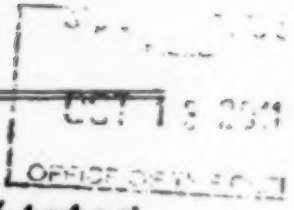
Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

Bd. of Envtl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Am Elec. Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010) (No. 10-174); *Sackett v. United States Envtl. Prot. Agency*, 622 F.3d 1139 (9th Cir. 2010), *cert. granted*, 2011 WL 675769 (June 28, 2011) (No. 10-1062).

AMICUS CURIAE BRIEF

No. 10-708



In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
Successor in Interest to the First American Corporation,
and First American Title Insurance Company,

Petitioners,

v.

DENISE P. EDWARDS, Individually
and on Behalf of All Others Similarly Situated,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT LAND TITLE AGENTS *AS AMICUS CURIAE* IN SUPPORT OF RESPONDENT

GREGORY W. HAPP
Counsel of Record
238 West Liberty Street
Medina, Ohio 44256
(330) 723-7000
gregoryhapp@msn.com

*Counsel for Amicus Curiae
National Association of
Independent Title Agents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 343-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
STATEMENT	5
I. THE TITLE INSURANCE PROCESS	5
A. Real Property Title Assurance Prior to Title Insurance	7
B. Emergence of Title Insurance	8
C. Modern Title Insurance Practices	11
D. Marketing of Title Insurance Through Reverse Competition	18
E. The Formation of Affiliated Business Arrangements and Controlled Business Arrangements to Market Title Insurance	19
F. Buying of Market Share by Title Insurance Companies/Underwriters	20
II. VARIATION IN TITLE INSURANCE COMPANIES/UNDERWRITERS	22
A. Differences in Performance of Basic Services	23
B. Differences in Claim Handling	25
C. Differences in Financial Stability	26
D. Differences in Defalcation Prevention	28

TABLE OF CONTENTS – Continued

Page

ARGUMENT 29

I. REVERSE COMPETITION HARMS CONSUMERS AND INDEPENDENT TITLE AGENTS 30

II. CONGRESS RECOGNIZED THE IMPORTANCE OF A CONSUMER'S LEGAL RIGHT TO SELECTION OF SETTLEMENT SERVICE PROVIDERS 32

III. THE INJURIES DUE TO SUBSTANDARD TITLE INSURANCE SETTLEMENT SERVICES ARE LATENT AND HARD TO DETECT 34

IV. OHIO DOES NOT FIX OR ESTABLISH TITLE INSURANCE RATES 36

V. GOVERNMENTAL ENFORCEMENT EFFORTS CANNOT TAKE THE PLACE OF CONSUMERS ENFORCING THEIR OWN RIGHTS UNDER RESPA 38

A. State RESPA Enforcement Lacks Deterrence 39

B. Federal Enforcement is Difficult, Prohibitively Complex, and of Secondary Importance 41

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

In the Matter of Ticor Title Insurance Co., et al., FTC Docket No. 9190 *Initial Decision Issued By Administrative Law Judge Morton Needleman* (Complaint filed January 7, 1985) (Decision Filed December 22, 1986); reprinted *Competitive Practices In The Title Insurance Industry, Hearing Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary House of Representatives* (May 4, 1988), Ser. No. 132, Appendix 2 ..... 10, 20, 37

Watson v. Muirhead, 57 Pa. 161 8

STATUTES

12 U.S.C. §§ 2601, *et seq.* 1

12 U.S.C. § 2601(a) 33

12 U.S.C. § 2604(b)(4) 33

12 U.S.C. § 2607 4

12 U.S.C. § 2607(d)(2) 5, 35, 39

12 U.S.C. § 2608(a) 33

12 U.S.C. § 2614 35

12 U.S.C. § 2617(c)(1) 41

ORC Ann. § 3935.04(D) 36, 37

ORC Ann. § 3935.07 37

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

Dr. E. S. Savas, Assistant Secretary For Policy Development And Research, U.S. Department of Housing And Urban Development, *Testimony Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance And Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) 32

James L. Boren, Jr., President of ALTA, *Testimony and Written Statement: Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcommittee On Housing And Community Development Of The Committee On Banking, Finance And Urban Affairs, House of Representatives*, 97th Cong. 1st Session (September 15, 1981) 22, 38

Thomas P. Vartarian, General Counsel of the Federal Home Loan Bank Board, *Statement; Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee, On Banking, Finance And Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) 20

TABLE OF AUTHORITIES – Continued

Page

TREATISES

Nielsen, J. Bushnell, *Title & Escrow Claims Guide*, Second Edition, Woodridge Legal Publishers (2007) 26

GOVERNMENTAL REPORTS

Birnbaum, Birny, Report to the California Insurance Commissioner, "*An Analysis of Competition in the California Title Insurance and Escrow Industry*" (December 2005).....21

Department of Justice's Antitrust Division, *The Pricing and Marketing of Insurance* (January 1977) reprinted in part in *Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee On Banking, Finance, and Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981).....*passim*

Report of Department of Housing and Urban Development and Veterans Administration, Mortgage Settlement Costs (1972) reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, And Site Selection Policies: Hearings Before the Subcommittee On Housing of the Committee on Banking and Currency, House of Representatives*, 92d Congress, Second Session (February 22-24, 1972).....5, 6

TABLE OF AUTHORITIES – Continued

Page

Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers, Report to the Ranking Member, Committee on Financial Services, House of Representatives, Government Accountability Office (April 13, 2007), *available at* http://www.gao.gov/new.items/d07401.pdf (last visited October 14, 2011) 39

OTHER MATERIALS

Al Harris, *Embezzlement investigation hits firm hard*, Richmond BizSense (September 19, 2011), *available at* http://www.richmondbizsense.com/2011/09/19/embezzlement-investigation-hits-firm-hard/ (last visited October 14, 2011) 28

Alexandra Clough, *Title Firm's Owner AWOL As Claims Rise To 10 Million*, Palm Beach Post (August 09, 2009), *available at* http://www.palmbeachpost.com/business/content/business/epaper/2009/08/09/a1b_cloughcol_0810.html (last visited on October 14, 2011) 29

Demotech, Inc., *Financial Stability Ratings Title Definitions* (2011), *available at* http://www.demotech.com/01_pages/services/fsr/fsr_title_definitions.aspx (last visited October 14, 2011).....27

LandAmerica Financial Group files bankruptcy – sells business Reuters (November 26, 2008), *available at* http://www.reuters.com/article/2008/11/26/us-landamerica-idUSTRE4AP1W420081126 (last visited October 14, 2011) 27

TABLE OF AUTHORITIES – Continued

Page

Matt Carter, *Fidelity, LandAmerica agree to merger,* inmannews (November 7, 2008), *available at* http://www.inman.com/news/2008/11/7/fidelity-landamerica-agree-merger (last visited October 14, 2011) 27

OAITA, *Settlement Preference Survey*, *available at* http://www.oaita.org/OAITA_SPS_Executive Summary.pdf (last visited on October 14, 2011) 30

Stewart Title, *Build Confidence, Escrow Security Bonds, Product Flyer* (2010), *available at* http://stewartbonds.com/download/881/pdf/SSIS-1022-26-10_ESB_Product_Flyer_lowres.pdf (last visited October 14, 2011) 28

The Title Report, *Defalcation trends: Why are some states losing more agents than others?* (June 13, 2005), *available at* http://www.thetitlereport.com/TTR/Articles/10003.aspx (last visited on October 14, 2011) 23

Timothy A. Thrush, *Insured Closings*, Hennepin Lawyer, Official Publication of the Hennepin County Bar Association (October 28, 2004) at 2 of 5, *available at* http://hennepin.timberlakepublishing.com/article.asp?article=863&paper=1&cat=147 (last visited October 14, 2011) 17

Title Resources, *A Brief History of Title Insurance* (2011), *available at* https://www.titleresources.com/History.aspx (last visited on October 14, 2011) 10

BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT LAND TITLE AGENTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Independent Land Title Agents ("NAILTA") is a national trade association consisting of state-licensed independent title insurance agents and state-licensed title insurance agencies, with associate membership extended to title insurance underwriters and title insurance industry stakeholders from across the United States.[2]

NAILTA's interest in this case is directed to ensuring the correct application of 12 U.S.C. §§ 2601, *et seq.*, in order to protect the consumer and promote competition in the title insurance industry. NAILTA believes that this brief will assist the Court in understanding the complexities of the title insurance process and determining whether standing should be

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution towards the preparation and submission of this brief. All parties have consented to this filing.

[2] "Title insurance agent" refers to a NAILTA member's authorization to write, or issue, title insurance policies that are underwritten by a title insurance company/underwriter. Some members write title policies principally through a single title insurance company/underwriter, while other members write policies through multiple insurance companies/underwriters.

afforded consumers who sustain injury when their right to select a settlement service provider has been systematically denied through prohibited kickback referral schemes. In addition, NAILTA's numerous Ohio members have a high degree of familiarity with the title insurance industry and the regulatory scheme of Ohio where Respondent closed her home loan.

NAILTA is a non-profit, member-supported national trade organization working to protect the transparency, credibility and sanctity of the land title process. NAILTA works to protect the independence of the title insurance industry from its referral sources and the Association advocates for competition in the industry and the removal of conflicts of interest from the real estate process for title insurance consumers (i.e., homeowners, buyers and borrowers). In furtherance of its mission, NAILTA also filed an *amicus curie* brief in support of Respondent in the Ninth Circuit Court of Appeals.

The issues presented by NAILTA are relevant to the current matter because the practices alleged in this case restrict competition, reduce the transparency of both the title insurance industry and the real estate process, and undermine the title insurance consumer's right of choice of title insurance providers.

NAILTA in support of Respondent believes that the private right of action conferred upon Respondent and those similarly situated by Congress, is a

continuing deterrent to illegal referral fee arrangements, such as that alleged in this case.

SUMMARY OF ARGUMENT

Respondent's complaint alleges that Petitioner, First American Financial Corporation, paid two million dollars to Tower City Title Agency, LLC (Tower City), a Cleveland-based title insurance agency, in order to secure an exclusive title insurance referral arrangement, as well as a small ownership interest in that Tower City. (Pet. App. 53a ¶ 20). Respondent's complaint also alleges that pursuant to the exclusive title insurance arrangement, Tower City arranged for Respondent's purchase of an owner's and lender's title insurance policy from Petitioner, First American Title Insurance Company, without Respondent's knowledge of or consent to the alleged kickback/referral arrangement. (Pet. App. 49a ¶¶ 3-5).

The question whether a consumer suffered an "injury" from a kickback or referral fee scheme prohibited by RESPA, cannot be answered by looking solely at whether or not there was an "overpayment" of the title insurance premium. Residential real estate title insurance covered by RESPA, as part of regulated "settlement services," involves far more than the sticker price of title insurance.

The real estate settlement services provided by a title insurance company/underwriter or its title insurance agent involve a bundle of title-related

services, including a title search, a title examination, a determination of insurability, a determination of exceptions to the title policy, issuance of a title policy and the issuance of "closing protection letters" to protect against defalcations. The ability, quality, and manner of the performance of these multiple services – all provided in the consumer's purchase of title insurance from a title insurance company/underwriter – are of equal or greater significance to the consumer than the charge for title insurance.

Each of these title-related services comes at a price and has an essential value to the title insurance consumer. The final product (the title insurance policy) delivered to the consumer can only be measured in terms of quality and completeness through the use of honest and independent judgment, untainted by illegal kickbacks and/or illegal referral fee schemes prohibited by Section 8 of RESPA. 12 U.S.C. § 2607. Only with an understanding of the complexities of the title insurance process can the injury suffered by a consumer, whose choice of settlement service providers is manipulated by a prohibited kickback and/or referral fee scheme, be determined.

In enacting Section 8, Congress understood the complexity and difficulty in quantifying the precise harm that illegal kickbacks and illegal referrals have on the bundle of title services being provided to the consumer by the title insurance company/underwriter and its agent. The imposition of statutory damages when a violation of Section 8(a) of RESPA occurs is indicative of Congress' understanding of the difficulty

any consumer would face in trying to quantify the specific pecuniary harm in circumstances where the result of the harm may not immediately be known. In fact, low quality or substandard title insurance services during the title insurance process may not be known until the consumer seeks either to sell or refinance the real property, many years after the service is performed.

It is in the context of the amalgam of settlement services being provided in the title insurance process that Respondent's standing to bring a private cause of action under Section 8 of RESPA, 12 U.S.C. § 2607(d)(2), must be determined, not merely by whether or not Respondent was overcharged for her owner's and lender's policies of title insurance as argued by Petitioners and their *amici*.

The harm to Respondent is not speculative or hypothetical or a general grievance. Respondent's injury is real and cognizable because her right to freely select the title insurance/underwriter of her choice from which to purchase title insurance related services was breached by a prohibited referral scheme.

STATEMENT

I. THE TITLE INSURANCE PROCESS

"The ownership of real property has long been one of the great bulwarks of the American free enterprise system." *Report of Department of Housing and*

Urban Development and Veterans Administration, Mortgage Settlement Costs (1972), at 5.[3] Possession, occupancy and use derived from title to real property are of paramount importance to the potential or actual land owner.

Title to real property is a bundle of legally protected rights, which include possession, control, enjoyment, and the power to transfer the property to another. It is in the exercise of the "power to transfer" that the issue of clear title or marketable title arises. In any transfer of an interest in real property, whether by sale or by mortgage, the purchaser or lender desires to know what pre-existing rights or interests of others might encumber or restrict the use of the real property being sold.

Encumbrances and other title defects that affect the title to real property may take numerous forms, including pre-existing liens, easements, use restrictions or claims arising from defects in prior transfers, such as failure of an heir or spouse to have transferred his or her rights in a prior transfer. Only by understanding the encumbrances and title defects that affect real property can a purchaser and/or mortgage lender decide whether marketable title exists

---

[3] Reprinted in *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, And Site Selection Policies: Hearings Before the Subcommittee On Housing of the Committee on Banking and Currency, House of Representatives*, 92d Congress, Second Session (February 22-24, 1972), at 741.

and whether the property could be used for the purposes intended by the purchaser.

A. Real Property Title Assurance Prior to Title Insurance

Before 1876, the basic method of providing proof of a marketable title and disclosure of any restrictions on use of the real property involved searching the public records in the county of the *situs* of the real property. This public records search was performed by an "abstractor," who, after the search was completed, would deliver to a potential purchaser or lender an "abstract of title." An abstract of title was a chronological order of all related and relevant publicly recorded documents that affected the title to the real property at issue. This would include a chain of ownership or chain of title from the current owner to each of the prior owners, back to original acquisition of the real property via transfer by original patent from the sovereign. The abstract of title would also disclose any encumbrance that was either voluntarily or involuntarily placed against the real property by any of the owners shown in the chain of title.

The "abstract of title" did not evaluate the legal efficacy of any of the documents reported by the abstractor. If the buyer or lender desired to have the documents evaluated, the abstract of title would be turned over to an attorney who would issue an "Attorney's Opinion" or "Certificate of Title" regarding

the state of the title and any encumbrances and their effect on the title or use of the real property.

As to both the "abstract of title" and the "attorney's opinion," if either the abstractor or the attorney made a mistake, liability would arise from an action based on negligence. However, any negligence claims were limited by the applicable statute of limitations and/or the death of the abstractor or the attorney. A further limitation was the fact that since all of the work of the abstractor or the attorney was based upon the public record, any defects of title occurring "off-record" were not within their scope of cognizable negligence.

B. Emergence of Title Insurance

In 1868, the Pennsylvania Supreme Court decided the case of *Watson v. Muirhead,* 57 Pa. 161. The case held that Watson, an innocent purchaser of real property, had no recourse against Muirhead, a title abstractor, for clearing the title to the real property after relying on the advice of an attorney that certain judgments were invalid. As a result of the *Muirhead* decision, the Pennsylvania legislature enacted a statute that authorized the issuance of title insurance. On March 28, 1876, a group of conveyancers met in a small office opposite Philadelphia's Independence Hall to incorporate the world's first title insurance company, The Real Estate Title Insurance Company. This company was the first to issue guarantees of title with specific indemnity clauses. From this early

"Philadelphia System" arose modern title insurance, the only form of insurance invented in the United States.

In simplest terms, title insurance is a contract of indemnity between the title insurance company/ underwriter and the insured (the purchaser and/or lender) that is designed to protect purchasers or mortgage lenders from unforeseen loss due to title defects such as liens or encumbrances upon, defects in, or the unmarketability of, the title to real property for which the policy is issued. In addition, title insurance could protect purchasers and/or mortgage lenders from "off-record" risks not discoverable from an examination or evaluation of the publicly recorded documents, e.g., forgeries and fraudulent conveyances, etc.

These contracts of indemnity have evolved into two types of recognized title insurance policies: (i) policies issued to protect buyers of real estate (Owner's Policy of Title Insurance); and (ii) policies issued to lenders to protect the mortgagee's title, which secures the loan (Loan Policy of Title Insurance).

The fundamental difference between land title insurance and other types of casualty insurance (which include homeowners, automobile and commercial general liability insurance) has always been the commitment of the title insurance industry to seek "risk prevention" over "risk assumption." "Title insurance is closer to a risk avoidance service than to

risk indemnification." Department of Justice's Antitrust Division, *The Pricing and Marketing of Insurance* (January 1977), at 7 (hereafter "*1977 DOJ Study*").[4]

The casualty insurance approach of "risk assumption" assures financial indemnity through a pooling of risks for losses arising out of an unforeseen future event such as death or accident. The title insurance approach of "risk prevention" has as its goal the elimination of risks and the prevention of losses caused by defects in title arising out of events that occurred in the past.

Prior to World War II, the growth of the title insurance industry had been limited to local and regional title insurance underwriters. After World War II the enormous demand and expansion of home ownership produced an equally expanded secondary mortgage market.[5] From the growth of the secondary mortgage market arose the need for standardization of both title assurances and mortgages.[6] Title

---

[4] Reprinted in part in *Real Estate Settlement Procedures Act – Controlled Business, Hearings Before the Subcommittee On Housing and Community Development of the House Committee On Banking, Finance, and Urban Affairs*, Ser. No. 97-24 (September 15-16, 1981) (herein "*1981 Hearings*"), at 253.

[5] Title Resources, *A Brief History of Title Insurance* (2011), *available at* https://www.titleresources.com/History.aspx (last visited on October 14, 2011).

[6] *In the Matter of Ticor Title Insurance Co., et al.*, FTC Docket No. 9190 *Initial Decision Issued By Administrative Law Judge Morton Needleman* (Complaint filed January 7, 1985) (Decision

(Continued on following page)

insurance provided this standardization for titles to real property.

C. Modern Title Insurance Practices

The concepts and guarantees embodied in an abstract of title and an attorney's opinion still provide the fundamentals of how a title company/underwriter issues a policy of title insurance for a specific real estate purchase or mortgage loan. The process of producing an abstract of title is now more commonly called a "title search." Often, the title search is either performed by an in-house employee of the title insurance company/underwriter, by its title insurance agent or by an independent title-searching service.

Whether done in-house or by an outside title searching service, once the title search is completed it is submitted for examination by the title insurance company/underwriter, its title insurance agent, or both. Next, an examination of the title search is performed, which is not unlike the traditional attorney's evaluation of the abstract of title made in order to issue an attorney's opinion or certificate of title. A title examination consists of a critical analysis or interpretation of the condition of title as revealed by

---

Filed December 22, 1986) at 18 ¶ 37; reprinted *Competitive Practices In The Title Insurance Industry, Hearing Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary House of Representatives* (May 4, 1988), Ser. No. 132, Appendix 2, at 131.

the documents disclosed by the title search to determine the insurability of the title.

The importance of the title search, the title examination, and the determination of insurability, to all parties to a real estate transaction, cannot be overstated. The examination of the title search for encumbrances or title defects is the basic element of risk avoidance in determining the insurability of the title by the title insurance company/underwriter. It is also the basis upon which a mortgage lender determines if it will have marketable title to its mortgage and the basis upon which a purchaser is informed of any undesirable limitations on the use of the real property that have been imposed upon the real property by prior owners.

In modern title insurance practice, the results of the title search and the examination of title are manifested in "Schedule B" of the preliminary title report and contract for title insurance, more commonly known as "the binder," or "title commitment." Schedule B of the title commitment discloses to the purchaser and/or lender what, if any, encumbrances, restrictions on use, liens or other defects, often referred to as "show items," affect the title to the real property. In the context of title insurance, those encumbrances, and other items listed which have been determined to affect the title, are in fact a list of title defects or encumbrances that are "exceptions from coverage" by the insurance company/underwriter.

The risk of a claim based upon any of the title commitment Schedule B "show items" is avoided by listing exceptions to coverage of the items at this initial stage of the title insurance process. Unless removed or "cured" prior to closing of the transaction, the Schedule B "show items" to the commitment will be transferred to Schedule B of the final title insurance policy, and those exceptions will prevent specific indemnity for those items.

The title commitment Schedule B "show items" have other significant uses in a real estate transaction besides being the basis for risk avoidance by the title insurance underwriter. The title commitment's Schedule B "show items" provide the mortgage lender sufficient information to determine whether there exists a mortgage that will be a first and best lien acceptable in the secondary market, or whether the title has material defects that adversely affect the mortgage's priority and marketability. For example, if Schedule B shows a prior judgment lien that would have priority over the proposed mortgage lien of the lender, the lender can refuse to make the loan until the lien is satisfied and cancelled of record.

The title commitment Schedule B "show items" are also utilized by the purchaser and any attorney, surveyor, architect, and/or engineer employed to advise the purchaser regarding the feasibility of the planned use of the real property by the purchaser. For example, if a pipeline right of way appears as a "show item," it is then imperative for the purchaser to know where the pipeline right of way is located on the real

property and whether the pipeline right of way will prevent any future construction of a home, home addition or other structure within the right of way. Without this information, a purchaser could unfortunately find that a subsequent garage built over the pipeline right of way must be removed.

A review of Schedule B of the title commitment allows the purchaser and purchaser's advisors to make an informed decision as to whether to insist that an encumbrance or title defect be removed by the seller, if the purchase agreement provides for such remedy. If removed, the encumbrance or title defect is no longer excluded from title insurance coverage and is no longer an impediment to the purchaser's use. In the alternative, or if the seller cannot remove the encumbrance or title defect, the purchaser may refuse to proceed with the purchase due to the adverse effect a disclosed encumbrance or title defect imposes on the purchaser's planned use of the property.

From this description of Schedule B "show items," the importance of the quality of the title search and subsequent title examination is readily apparent. However, not all title companies/underwriters employ or mandate the same standards either in performing a title search or a title examination, or accepting the results of such a title search or title examination.

For example, Ohio law requires only that every policy of title insurance must be based upon a "reasonable examination of title" and "a determination of insurability." Ohio has no mandated standards except

a general requirement that examination of title and determination of insurability should be left to the "sound underwriting practices" of title insurance companies/underwriters. ORC Ann. § 3953.07.

Further, Ohio has no statutory requirement that the title search, the examination of title, and/or the determination of insurability be performed by an attorney or licensed title insurance agent or other licensed person. In fact, in Ohio the title search, the title examination and the determination of insurability may be performed by an attorney, licensed title agent or some other unlicensed person whom the title insurance company/underwriter or title insurance agent decides has sufficient relevant knowledge and ability.

Such minimal and unspecific standards have produced within the title industry a wide variation in the skill and knowledge of the individuals performing title searches, title examinations and determination of insurability. In the experience of NAILTA members, these variations produce corresponding effects on the quality of title searches, title examinations, and/or determination of insurability.

Another significant variable in the title insurance process is in the manner of the "closing" of the real estate transaction. There are two recognized types of real estate closings: the "round table closing" and the "escrow closing."

A round table closing consists of all interested parties meeting face-to-face to simultaneously exchange

funds and instruments of conveyance. An escrow closing, by contrast, does not entail an actual closing or meeting of all parties to exchange funds and instruments of conveyance. The closing is handled by a neutral third party.

The third party, an "escrow agent," secures a separate "sign-up" of the seller and/or purchaser/borrower for any necessary documents. Once the escrow agent secures execution of all the necessary documents and has receipt of all funds necessary to close the transaction, the instruments of conveyance are recorded with the appropriate local governmental office and the funds placed into escrow are disbursed. In certain areas of the country, including northeastern Ohio, title insurance agents act as escrow agents to handle the closing for a real estate purchase or mortgage refinance.

Even in a round table closing, a "settlement agent," employed by the title insurance company/underwriter or the title insurance agent is necessary to handle all the major aspects of bringing the transaction to "closing." This may include receiving, handling and disbursing funds received from the mortgage lender.

Policies of title insurance do not insure closing services or matters of escrow. In a majority of jurisdictions, the title insurance company/underwriter is insulated from liability of independent closing agents

not employed directly by the title insurance company/ underwriter.[7]

Because title insurance agents may act as settlement agent or escrow agents, who handle settlement funds and documents, the title insurance industry has seen the emergence of separate title insurance coverage by title insurance companies/ underwriters for the handling of the funds and documents placed into escrow for a real estate transaction.

Closing or settlement protection coverage is issued by the title insurance company/underwriter providing a "closing protection letter" to the seller, purchaser or lender involved in a real estate transaction that requires title insurance. The "closing protection letter" makes the title insurance company/ underwriter responsible for lost funds or documents due to a defalcation of the title insurance company/ underwriter's agent.[8]

---

[7] Timothy A. Thrush, *Insured Closings*, Hennepin Lawyer, Official Publication of the Hennepin County Bar Association (October 28, 2004) at 2 of 5, *available at* http://hennepin.timberlakepublishing.com/article.asp?article=863&paper=1&cat=147 (last visited on October 14, 2011).

[8] "Defalcation" in the title industry refers to the misappropriation or misuse of escrow funds intended to be used to close insured transactions by a settlement agent or title insurance/ escrow agent.

D. Marketing Of Title Insurance Through Reverse Competition

Since title insurance is ancillary to the purchase of real property, the financing of the purchase, or the re-financing of an existing mortgage loan, the marketing of title insurance differs from other forms of insurance. Marketing of title insurance often occurs through the process of "reverse competition."

> In other words, competition in the title insurance business is directed at the producer of the business rather than the consumer. A title company wishing to increase its market share would not necessarily try to reduce prices or improve coverage in order to attract retail purchasers of title insurance. Rather, the company would seek to influence those brokers, bankers and attorneys who are in a position to direct the title insurance business to it. The most direct manner of influencing this is to grant the producer of the business a fee, commission, rebate, or kickback – to the detriment of the title insurance purchaser. This is the phenomenon of reverse competition.[9]

In a real estate transaction, due to the complexities of the title insurance process, the purchaser/borrower is often amenable to being referred by someone who the purchaser/borrower believed to be acting in his or her best interest, such as a title

---

[9] *1977 DOJ Study*, at 256.

insurance agent, a real estate broker/agent, a loan officer or a builder. However, the consumer is generally unaware of whether the referral is based on the payment of a kickback or referral fee, rather than on the merits and in the consumer's best interests.

> The presence of reverse competition in the title insurance industry has resulted in "a long history of such anti-competitive practices as fixed fees, forced (tied) sales and kickbacks." Reverse competition (h)as the effect of raising the cost of title insurance, for the higher the cost of the insurance, the larger the referral commission or kickback to the business producer and the more business a title insurer is likely to have. There is little incentive to increase efficiency of title search or expand coverage.[10]

E. The Formation Of Affiliated Business Arrangements And Controlled Business Arrangements To Market Title Insurance

After the passage of RESPA in 1974, in order to circumvent Section 8's prohibitions against illegal kickbacks and unearned fees for referrals and in order to continue the pre-RESPA common practice of the payment of referral compensation, referral sources began acquiring an ownership interest in a

---

[10] *1977 DOJ Study*, at 256-257.

title insurance agent's business.[11] This practice became known as "affiliated business arrangements" or "controlled business arrangements."

These business arrangements continued the title insurance company/underwriter's and title insurance agent's approach to marketing title insurance services by "reverse competition."[12] By providing an ownership interest in the title insurance company/underwriter's or title insurance agent's business, referral sources could ostensibly be compensated by dividends or other profit sharing arrangements. As a result, these "controlled" or "affiliated" business arrangements perpetuate the pre-RESPA practice of the title insurance company/underwriter or title insurance agent being able to compensate its referral sources.

F. Buying of Market Share By Title Insurance Companies/Underwriters

The growth of title insurance companies/underwriters is "largely tied" to their ability to solicit and retain agents "who can influence the placement of business."[13] This model for title insurance marketing by title insurance companies/underwriters has led

---

[11] See: Thomas P. Vartarian, General Counsel of the Federal Home Loan Bank Board (*1981 Hearings*), at 51.

[12] *1977 DOJ Study*, at 274.

[13] *Supra* at n.6, *In the Matter of Ticor Title Insurance Co.* at 20 ¶ 44.

to a significant consolidation, both vertical and horizontal, in the national title insurance industries, referred to as "buying market share."[14]

Title insurance companies/underwriters, like Petitioners here, utilize "Captive Title Insurance Agreements" (hereafter "CTIA" or "CTIAs") to buy market share in the title insurance industry within a specific market area. A CTIA occurs when a title insurance company/underwriter purchases a financial interest in a previously independent title insurance agent, who may already represent multiple title insurance companies/underwriters, and who has a significant share of a particular localized title insurance market. As part of the purchase transaction, the title insurance agent agrees to refer all or substantially all of the agent's title insurance business to the purchasing title insurance company/underwriter.

CTIAs can be differentiated from an "exclusive agent relationship" established between a title insurance company/underwriter and a title insurance agent. The distinguishing factor between a CTIA and an exclusive agent relationship is the current practice of title insurance companies/underwriters paying money to title insurance agencies (two million dollars in this case) in order to secure the title insurance

---

[14] Birnbaum, Birny, Report to the California Insurance Commissioner, "*An Analysis of Competition in the California Title Insurance and Escrow Industry*" (December 2005), Section 5.2.2.2, at 59.

referrals and to buy market share.[15] Even though this type of business arrangement may be (according to Petitioners' *amicus* the American Land Title Association, herein "ALTA") "decades old, widespread and exceedingly popular,"[16] the payment for the exclusive referral arrangement is expressly prohibited by Section 8(a) of RESPA.[17]

II. VARIATION IN TITLE INSURANCE COMPANIES/UNDERWRITERS

Because title insurance is a complex process, differences between and among title companies/underwriters can have a significant effect on the title insurance services delivered to consumers. Thus, a title insurance consumer's selection of a title insurance company/underwriter can benefit the consumer – or injure him or her if the selection is not made freely and properly.

---

[15] See: *Affidavit of James Stipanovich*, Joint Appendix, at 128-129.

[16] ALTA Br. at 7.

[17] ALTA, which supported RESPA's enactment in 1974 and an outright prohibition on "controlled" or "affiliated" business arrangements in 1983, now seeks to defang RESPA altogether. See: James L. Boren, Jr., President of ALTA (*1981 Hearings*) at 168. The reason for ALTA's about-face is that its members (such as Petitioners) have adopted the same tactics they once criticized and are now paying kickback and referral fees for market share, as with Tower City.

These disparities in quality and service are so well known in the industry that they have been acknowledged by the prior owner of Tower City, the recipient of Petitioners' $2 million referral fee. In a 2005 symposium, Marilyn Mannarino (then Tower City's President) tied the risk of title agent defalcation to the rise of ABAs and CBAs and the role of title insurance companies/underwriters. "When the title company ceases to be the disinterested third party, bad decisions can be made – sometimes on purpose and sometimes because they are looking through rose-colored glasses."[18]

And yet these variations among underwriters are virtually impossible for consumers to discern when buying a home, while the harms to consumers may be undetectable (except at great cost), or unknown for many years after the purchase transaction, as we now show.

A. Differences in Performance of Basic Services

Variations in the title insurance company/underwriter's practices and standards translate directly to the quantity and quality of the information provided in the title search, the reliability of the title

---

[18] The Title Report, *Defalcation trends: Why are some states losing more agents than others?* (June 13, 2005), *available at* http://www.thetitlereport.com/TTR/Articles/10003.aspx (last visited on October 14, 2011).

examination, and ultimately the determination of insurability. Unfortunately, in recent years the practices and standards for a land title search demanded by some title insurance companies/underwriters have been relaxed. The title search period for a chain of title has been reduced from the customary periods of clearing restrictions and uses by operation of state marketable title acts, to searches restricted by the time period of the current owner's coming into title.

A "current owner" search of the title records omits liens and other encumbrances that would have attached to the interest held by prior owners in title. This is in contrast to many of NAILTA member regional title insurance companies/underwriters' requirements for the customary "full title search" of thirty, forty-two or sixty-plus years beginning from the deed or "root" of the current owner's title.

The lesser standard of "current owner search" is primarily utilized as a cost saving measure by the title insurance company/underwriter and its agents. However, there is no evidence that such cost savings have been reflected in any corresponding reduction in charges to the consumer for such lesser title search.

Further, the current owner search provides the consumer a lesser quality title search. It provides no record of "use" restrictions or other encumbrances prior to the current owner's acquiring title. This directly affects the real property purchaser's ability to have a complete picture of the title, including any existing easements and other restrictions that might

affect use of the property. Only through a "full title search," and a detailed listing of encumbrances, easements and restrictions in Schedule B of the title commitment, can a purchaser know the status of the title to the real property prior to closing the transaction and the issuance of the title insurance policy.

B. Differences in Claim Handling

The selection of the means of handling claims against the insured's title, as set forth in a policy of title insurance, is another discriminating factor that separates title insurance companies/underwriters. Under a standard policy of title insurance, the title insurance company/underwriter has six expressed means to handle a claim. The title insurance company/ underwriter may:

"1. Pay the insured his or her actual loss * * * ;

2. Defend an insured who has been sued * * * ;

3. Prosecute an action on behalf of the insured to establish or clear title * * * ;

4. Pay the insured policy limits * * * ;

5. Pay the party adverse to the insured * * * ; and,

6. Cure the insured's title by obtaining a deed, easement, release or other instrument * * *

> The insurer never has all six options in a particular claim, but when there is more than one option, the insurer has the right to choose which one it will exercise. In some instances, insurers also have a seventh option not directly described in the policy, which has been termed 'watchful waiting' or 'meaningful monitoring.' This option is the appropriate response when a potential for loss exists, but the coverage in the policy calls for the insurer to act only on the occurrence of some future event."[19]

A title insurance company/underwriter's propensity to deny, settle or litigate claims is another significant factor in the quality of title insurance coverage offered by the title insurance company/underwriter. If a title insurance company/underwriter litigates all claims under the title insurance policy as a matter of course, the consumer can face years of litigation while the consumer's ability to sell or to re-finance is delayed until the claim is fully litigated, including any appeals.

C. Differences in Financial Stability

To a title insurance consumer, the financial strength of a title insurance company/underwriter may be of paramount concern if the real property being insured has significant value.

---

[19] Nielsen, J. Bushnell, *Title & Escrow Claims Guide*, Second Edition, Woodridge Legal Publishers (2007).

Annual insurance premiums generated or profitability cannot determine a title insurance company/underwriter's "financial stability rating." It is the title insurance company/underwriter's "balance sheet strength and financial integrity" that are "the ultimate determinants of the long term financial stability required to honor meritorious claims."[20]

This became evident on November 26, 2008, when LandAmerica Financial Group, Inc., which held ownership interests in six subsidiary title insurance underwriters, filed for bankruptcy protection. At the time of its bankruptcy filing, LandAmerica Financial Group, Inc. was the third largest title insurance company/underwriter in the United States. LandAmerica Financial Group, Inc. and four other title insurance companies/underwriters controlled 93% of the $14 billion U. S. title insurance market in 2007.[21]

---

[20] See: Demotech, Inc., *Financial Stability Ratings Title Definitions* (2011), *available at* http://www.demotech.com/01_pages/services/fsr/fsr_title_definitions.aspx (visited on October 14, 2011).

[21] See: Matt Carter, *Fidelity, LandAmerica agree to merger*, inmannews (November 7, 2008), *available at* http://www.inman.com/news/2008/11/7/fidelity-landamerica-agree-merger (last visited on October 14, 2011).

Also see: *LandAmerica Financial Group files bankruptcy – sells business*, Reuters (November 26, 2008), *available at* http://www.reuters.com/article/2008/11/26/us-landamerica-idUSTRE4AP1W42 0081126 (last visited on October 14, 2011).

D. Differences in Defalcation Prevention

Another critical element in the title insurance process has become issuance of "closing protection letters" that indemnify against a settlement agent or escrow agent absconding with a seller's, lender's or buyer's funds placed into escrow. Defalcations by title insurance settlement agents or title insurance/escrow agents are an increasingly severe problem for the title insurance industry and consumers.

Defalcations can adversely affect a title insurance company/underwriter's financial ability to continue to underwrite insurance. In September, 2011, Southern Title Insurance Company, a 90-year-old Virginia title insurance company/underwriter, ceased issuing title polices due to a significant defalcation by one of its Texas agents.[22] The title insurance industry had over 100 million dollars in defalcation losses in 2009 alone.[23]

Procedures for controls on and audits of title insurance agents or settlement agents handling escrow closings and escrow funds vary among title insurance companies/underwriters. The lack of such procedures

---

[22] Al Harris, *Embezzlement investigation hits firm hard*, Richmond BizSense (September 19, 2011), *available at* http://www.richmondbizsense.com/2011/09/19/embezzlement-investigation-hits-firm-hard/ (last visited on October 14, 2011).

[23] Stewart Title, *Build Confidence, Escrow Security Bonds, Product Flyer* (2010), *available at* http://stewartbonds.com/download/881/pdf/SSIS-1022-26-10_ESB_Product_Flyer_lowres.pdf (last visited on October 14, 2011).

can lead to significant defalcations by title insurance agents.[24]

ARGUMENT

Title insurance is not a commodity in which price is the only difference between the products offered by various suppliers. To the contrary, there is a great deal of variation among title insurance companies/ underwriters and in the way they operate. As we have explained, these differences include:

- the quality and care of the underlying title search performed;
- the method for handling any claims that are made against the insured's title;
- the financial stability of the title insurance company/underwriter; and
- the procedures in place for preventing defalcation by settlement or escrow agents.

These differences matter for consumers. Because of the way that the title insurance industry operates, such differences often will be invisible to consumers,

---

[24] See: *supra* n.18, The Title Report. Also see: Alexandra Clough, *Title Firm's Owner AWOL As Claims Rise To 10 Million*, Palm Beach Post (August 09, 2009), *available at* http://www.palmbeachpost.com/business/content/business/epaper/2009/08/09/a1b_cloughcol_0810.html (last visited on October 14, 2011).

who must by necessity rely on the advice of real estate professionals in securing title insurance. Yet consumers are unable to identify these variations in advance, when buying title insurance. And the injuries that result from disparities in service and quality can be latent and undetectable, except at prohibitive cost.

As a result, consumers are directly harmed when those real estate professionals render such advice under the influence of referral-based conflicts of interest. Congress enacted RESPA precisely so that choices among settlement service providers would be made on the merits, and it imposed statutory damages because these identifiable injuries would be so hard to detect and prove.

I. REVERSE COMPETITION HARMS CONSUMERS AND INDEPENDENT TITLE AGENTS

In 2009 and 2010, the Ohio Association of Independent Title Agents (OAITA) conducted a statewide survey of the real estate settlement service preferences of Ohio real estate consumers.[25] OAITA's "Settlement Preference Survey" polled real estate consumers about issues related to controlled business arrangements, referral schemes and conflicts of

---

[25] OAITA, *Settlement Preference Survey*, *available at* http://www.oaita.org/OAITA_SPS_ExecutiveSummary.pdf (last visited on October 14, 2011).

interest in the real estate and title insurance industries.

The results suggest that a majority of Ohio consumers involved in a real estate transaction: (i) rely on referrals to select a title insurance company/ underwriter; (ii) believe that it is "important" or "very important" that their title insurance agent be a "neutral third party in determining what affects their title;" and (iii) believe that it is a "conflict of interest" for a referral source to receive a profit from making a title insurance referral. By a margin of four to one (38% to 9%), consumers report that they are "less comfortable" when they learn to their surprise that their referral resulted from a "controlled business arrangement."[26] The OAITA study went on to conclude:

> "Title insurance agents lack meaningful access to Ohio real estate consumers concerning the merits and differences of their services. These inequities are enhanced by the referral sources and their advocates who promote CBAs and market consolidation as a further means to separate consumers from title insurance agents."[27]

Reverse competition in its present form of controlled business arrangements and CTIAs continues the negative impact on purchasers of title insurance found by

---

[26] *Id.*

[27] *Id.*

the *1977 DOJ Study*. When the referral source is able to direct the purchaser of title insurance to a particular title insurance company/underwriter or a particular title insurance agent that the referral source has an interest in or is receiving a referral fee from, the purchaser/consumer is likely to end up "paying unreasonably high premiums," "accepting unusually poor service," or "accepting faulty title examinations and policies" from the controlled business.[28]

II. CONGRESS RECOGNIZED THE IMPORTANCE OF A CONSUMER'S LEGAL RIGHT TO SELECTION OF SETTLEMENT SERVICE PROVIDERS

Congress in passing RESPA recognized that the consumer was best served if he or she was protected from certain injurious practices that impaired the consumer's ability to receive the best choice of any settlement service providers. As set forth above, the selection of a title insurance company/underwriter is often a critical decision and affects the consumer's ability to receive "clear" or "marketable" title to real property. A consumer's ability to select service providers was a basic assumption behind the enactment of RESPA.[29]

---

[28] *1977 DOJ Study*, page 273.

[29] See: Dr. E. S. Savas, HUD Assistant Secretary For Policy Development And Research (*1981 Hearings*), at 5.

This basic assumption is affirmed in RESPA's statement of intent to insure that consumers are provided with "timely information on the nature and costs of the settlement process." 12 U.S.C. § 2601(a). It is axiomatic that the reason to inform a consumer of the "nature and costs of settlement services" is to enhance a consumer's right to make informed decisions as to which settlement service provider to select.

Congressional emphasis on informing the consumer of "choice" in selection of settlement service providers is further evidenced by RESPA's mandate that the Secretary of Housing and Urban Development prepare and distribute "special information booklets" which "*include in clear and concise language*" "an explanation of *the choices available* to buyers of residential real estate *in selecting persons to provide necessary services* incident to a real estate settlement." 12 U.S.C. § 2604(b)(4) (Emphasis added).

Recognition of a consumer's right to freely make a selection of any settlement service provider is also found in Section 9 of RESPA's prohibition against sellers, who as a condition of sale require directly or indirectly "that title insurance covering the property be purchased by the buyer from any particular title company." 12 U.S.C. § 2608(a).

III. THE INJURIES DUE TO SUBSTANDARD TITLE INSURANCE SETTLEMENT SERVICES ARE LATENT AND HARD TO DETECT

Congress's decision to award statutory damages under RESPA, rather than to require detailed proof of specific pecuniary harm, is particularly sound because of the nature of the injuries caused by defective title insurance services. Such injuries are typically latent and hard to detect.

A consumer's injury based upon a substandard or poor quality title search and/or title examination, due to a violation of Section 8(a) of RESPA, may not emerge or be discovered for years after the closing and title transfer of the real property and the issuance of the final policy of title insurance. To find the defect the consumer would need a second "accurate" title search and title examination to be performed.

Normally, a consumer will not have another title search and title examination performed on the consumer's real property until another triggering event necessitating another title search, title examination and the issuance of title insurance. For example, if a consumer must remove a garage because it is built over a pipeline right-of-way, that problem could be hidden until the property is offered for sale. Likewise, a consumer will be unaware of problems in claims handling until a claim is actually asserted potentially decades later.

The triggering event often occurs when the consumer sells the property or re-finances his or her mortgage. It is only then that the new title search and title examination will uncover title defects or negative use restrictions undisclosed by the substandard or poor quality title search and title examination resulting from a Section 8 prohibited referral fee scheme. When the new title search and title examination discloses the defect the consumer will experience the impact of the original injury of the substandard or poor quality title search and title examination. Unfortunately, if the "curing" or "removal" of the undisclosed defect delays the consumer's transaction, the consumer bears the risk of the loss of a potential purchaser or the consumer, if refinancing, looses his or her mortgage loan "lock-in" rate.

A consumer's right to bring suit in federal court for an injury occasioned by the illegal kickback referral scheme is limited to one year. 12 U.S.C. § 2614. Without recognizing that Article III "standing" exists under RESPA for abridgement of a consumer's right to choose a service provider free of an illegal kickback referral scheme, there is little or no chance that the consumer would be able to bring a private action pursuant to 12 U.S.C. § 2607(d)(2), if the illegal kickback referral scheme later results in a substandard or poor quality title search and title examination that fails to disclose defects or adverse title restrictions on use.

Refusing to allow statutory damages would ignore the injury to the consumer that such schemes not only have on increased costs for title insurance, but on the latent injury that substandard or poor quality title search and title examination inflicts on the consumer.

IV. OHIO DOES NOT FIX OR ESTABLISH TITLE INSURANCE RATES

Petitioners argue that consumers including Respondent cannot establish standing under Article III of the Constitution unless they allege an overcharge for the purchase of the title insurance policy or policies issued. (Petitioners Br. p. 26). The basis of Petitioners' argument is the fact that at the time of Respondent's real estate transaction all Ohio licensed title insurance companies/underwriters were members of the Ohio Title Insurance Rating Bureau, which filed rates for all its members that were approved by the Ohio Superintendent of Insurance. (Petitioners Br. p. 5). ORC Ann. § 3935.04(D).

Therefore, Petitioners claim, because all premium rates for title insurance at the time of Respondent's real estate purchase were identical, there could be no overcharge. However, this argument ignores Ohio insurance law, procedures and practice.

Nothing in the Ohio insurance rate statutes would prevent Petitioners or any other title insurance company/underwriter from filing a ***lower*** rate than the rate filed by the rating bureau with the

Superintendent of Insurance, or seeking deviation from prevailing rates. See: ORC Ann. § 3935.04(D), ORC Ann. § 3935.07. And lower rates or deviations are likely to be approved. Even though the Superintendent of Insurance has the authority to disapprove filed rates, there are no instances of the Superintendent doing so.[30]

But Petitioners' reasoning is incorrect for a second, separate reason. Ohio does not regulate title search or title examination, or other related title insurance charges, which comprise a significant part of the cost to consumers.[31]

Ohio's title insurance rates approved by the superintendent of insurance reflect only a "risk rate."[32] A "risk" based rate applies only to risk assumption or underwriting expense but does not include costs involved in the title search or the title examination. Therefore, the title insurance premium charged a consumer in Ohio does not include the costs of the title search, title examination or other settlement services. As a result, at the time of Respondent's real estate purchase, all non-insurance premium charges

---

[30] *Supra* at n.6, *In the Matter of Ticor Title Insurance Co., et al.*, at 64, ¶ 158 and n.246. An October 4, 2011 check with the Ohio Department of Insurance revealed there had been no disapproval of any rate filings in the period of 1994 to 2011.

[31] Joint Appendix, at 41: *Ohio Title Insurance Rating Bureau, Inc., Schedule of Rates for Title Insurance in the State of Ohio* (effec. January 15, 2006).

[32] *Id.* at 43, ¶ 110, 65 ¶ 159; Joint Appendix, at 41.

for settlement services including the title search, title examination and other settlement services could be changed or varied without any rate being filed by the Ohio Title Insurance Rating Bureau or approved by the Superintendent of Insurance.

V. GOVERNMENTAL ENFORCEMENT EFFORTS CANNOT TAKE THE PLACE OF CONSUMERS ENFORCING THEIR OWN RIGHTS UNDER RESPA

Although RESPA provides certain remedies to state and federal regulators, Congress understood that private enforcement would also be required to ensure compliance with RESPA's anti-kickback provisions. This obvious truth has been recognized by the industry itself. As one of Petitioners' *amici* explained in 1981, federal regulation:

> "coupled with some well thought-out methods of enforcement, primarily private action[s] by consumers . . . would be a very good melding of Federal, State and private effort to cure a problem [the ill effects of kickbacks and referral fees] which is bothering us all."[33]

Accordingly, in crafting RESPA, Congress provided both the means and the incentive for private litigants to assure compliance with its mandates. See

---

[33] *Supra* n.17, James L. Boren, Jr., President of ALTA, *Testimony and Written Statement*, at 387.

12 U.S.C. § 2607(d)(2). Without the help of civil litigants enforcing their own rights, Congress's purpose for passing RESPA will be frustrated.

A. State RESPA Enforcement Lacks Deterrence

State regulators charged with RESPA enforcement are handicapped by limited resources and are therefore inadequate for protecting consumers. Title insurance is a relatively small line of insurance. State regulators scrutinize market conduct only minimally, which results in title insurance issues receiving minimal governmental oversight. *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, Report to the Ranking Member, Committee on Financial Services, House of Representatives, Government Accountability Office (April 13, 2007) at 47, "GAO Report."[34]

Additional funding alone will not cure this problem. A real estate transaction involves many different professionals: lawyers, bankers, builders, title agents, insurance agents and real estate brokers, each governed by different state regulators. *Id.* at 47. Thus, state regulators charged with policing the title insurance industry often lack the authority to pursue enforcement against many of the professionals identified

---

[34] *Available at* http://www.gao.gov/new.items/d07401.pdf (last visited October 14, 2011).

as the wrongdoers in a transaction. *Id.* And the state agencies that do regulate the non-insurance professionals have shown little interest in or knowledge of potential violations by their licensees. *Id.* at 48-49.

Moreover, the regulations governing these other professionals often substantially differ from those governing title insurers and agents, with each treating referral fees in a different way. *Id.* at 49. This further complicates enforcement efforts and makes cooperation and coordination between departments difficult. *Id.* at 47. For example, two state regulators responding to the most recent government survey of enforcement, confessed ignorance of the fact that referral fees were illegal under their state laws or under RESPA. *Id.* Thus, it is easy to see why at least one group of industry participants admitted they were not concerned about being caught engaging in illegal activity, because regulators had taken so little action in the past. *Id.*

Finally, state regulators lack the information, manpower and ability to police title insurance *rates*, apart from market behavior. According to the GAO, "few regulators review the costs that title agents incur to determine whether they are in line with the prices charged." *Id.* at 42. In addition, "only two of the six regulators [the GAO] . . . reviewed collected financial and operational data on title agents, and the regulatory officials both said that the data that they currently collect was insufficient to analyze the appropriateness of current premium rates." *Id.* at 42-43.

B. Federal Enforcement is Difficult, Prohibitively Complex, and of Secondary Importance

Congress vested the U.S. Department of Housing and Urban Development ("HUD") with authority to enforce RESPA at the federal level, 12 U.S.C. § 2617(c)(1), but only via injunctions.

Not surprisingly, federal authorities are at least as hamstrung as their state counterparts. HUD officials have also reported difficulties with their deterrence efforts because the small monetary settlements they obtain are considered to be a mere cost of doing business. *GAO Report* at 49. Between 2003 and 2006, settlements from HUD investigations resulted in approximately $302,000 in payments, while during the same period the combined net earnings of the five major national title insurers averaged about $1.6 billion each year. *Id.*

While RESPA does provide criminal sanctions for violations of Section 8 (a fine of up to $10,000 or up to 1 year in prison), such sanctions are rarely used, in part because they require prosecutions to be conducted by the Department of Justice. *GAO Report* at 41 n.29. Such insignificant penalties do not serve as an adequate deterrent to RESPA violations.

Moreover, HUD's enforcement mechanisms are complaint-driven. HUD relies on consumers not only to know when RESPA's mandates are being violated, but also to report such violations to authorities. *GAO Report* at 50. But most consumers are so overwhelmed

by their transaction that they cannot be expected to recognize when professionals they trust are violating the law. For these reasons, it is quite likely that many, if not most, RESPA violations are unreported. *Id.*

CONCLUSION

For these reasons, and those stated by Respondent, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

GREGORY W. HAPP
Counsel of Record
238 West Liberty Street
Medina, Ohio 44256
(330) 723-7000
gregoryhapp@msn.com

Counsel for Amicus Curiae
National Association of
Independent Land Title Agents

October 2011

AMICUS CURIAE BRIEF

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DAVID M. SCHULTZ
JOEL D. BERTOCCHI
Counsel of Record
STEPHEN R. SWOFFORD
MATTHEW T. GLAVIN
AVANTI D. BAKANE
HINSHAW & CULBERTSON, LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
JBertocchi@hinshawlaw.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. ALLOWING AWARDS OF DAMAGES UNDER THE FDCPA WITHOUT REQUIRING PROOF OF INJURY HAS LEAD TO PERVERSE RESULTS IN WHICH DAMAGES AND ATTORNEY FEES ARE AWARDED BASED ON TECHNICAL AND HARMLESS VIOLATIONS	4
II. THE ABSENCE OF A REQUIREMENT OF ACTUAL INJURY IN FDCPA CASES HAS SPAWNED A "COTTAGE INDUSTRY" OF LITIGATION DESIGNED TO GENERATE ATTORNEY FEES RATHER THAN REDRESS REAL HARM.	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Baker v. G.C. Servs. Corp., 677 F.2d 775 (9th Cir. 1982)	5
Ehrich v. I.C. System, Inc., 681 F.Supp.2d 265 (E.D.N.Y. 2010)	6, 7
Fasten v. Zager, 49 F.Supp.2d 144 (E.D.N.Y. 1999)	8
Fed. Home Loan Mtge.Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007)	5, 10
Heintz v. Jenkins, 514 U.S. 291 (1995)	2
Jacobson v. Healtcare Fin. Servs., Inc., 516 F.3d 85 (2d Cir. 2008)	5
Jacobson v. Healthcare Fin. Servs., Inc., 434 F.Supp.2d 133 (E.D.N.Y 2006)	11
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. ___, 130 S. Ct. 1605 (2010)	2, 3, 8, 10
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, Case No. 1:06-cv-01397-PAG, Memorandum of Opinion and Order, ECF Doc. # 59 (N.D. Oh. April 14, 2011)	9
Johnson v. Eaton, 80 F.3d 148 (5th Cir. 1996)	7
Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998)	5
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	7
Pipiles v. Credit Bureau of Lockport, Inc., 886 F.2d 22 (2d Cir. 1989)	7
Raines v. Byrd, 521 U.S. 811 (1997)	2
Richard v. Oak Tree Group, Inc., 2008 WL 5060319 (W.D. Mich. November 21, 2008)	6

TABLE OF AUTHORITIES—Continued

	Page
Richard v. Oak Tree Group, Inc., 2009 WL 3234159 (W.D. Mich. September 30, 2009)	6
Savino v. Computer Credit, Inc., 164 F.3d 81 (2d Cir. 1998)	5
Savino v. Computer Credit, Inc., 990 F.Supp. 159 (E.D.N.Y. 1998)	5
Thornton v. Wolpoff & Abramson, LLP, 2008 WL 185517 (11th Cir. January 23, 2008)	5
Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000)	4, 9
CONSTITUTION AND STATUTES	
U.S. Const., Art. III	3, 12
U.S. Const., Art. III, § 2	2
15 U.S.C.	
§ 1681c	8
§ 1692k(a)(1)	4, 5
§ 1692k(a)(2)	5
§ 1692k(a)(2)(A)	5
§ 1692k(a)(2)(B)	5
Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*	*passim*
Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601-2617	2, 3, 4, 12

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

Page

Anderson & Associates, *Fair Debt Collection Practices Act,* http://www.atlawhelp.com/fair-debt-collection-practices-act.html 12

FDCPA And Other Consumer Lawsuit Statistics, July 1-15, 2011, http://webrecon.com/b/news-and-stats/ 12

Nearly 11,000 FDCPA Lawsuits Filed In 2010, http://www.insidearm.com/daily/collection-laws-regulations/fdcpa/nearly-11000-fdcpa-lawsuits-filed-in-2010/ 11

The Todd Murray Law Firm, *Five Reasons To Sue A Debt Collector That Violates The FDCPA*, http://toddmurraylaw.com/tag/fdcpa/ 11

IN THE
Supreme Court of the United States

No. 10-708

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Retail Collection Attorneys (NARCA) is a nationwide, not-for-profit trade association of debt-collection attorneys.[1] NARCA's members include more than 700 law firms.

[1] No counsel for a party authored any part of this brief – the filing of which has been consented to by all parties – and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

NARCA members must meet association standards designed to ensure experience and professionalism. They are guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of pertinent laws and regulations.

"[S]trict compliance with the jurisdictional standing requirement," *Raines v. Byrd*, 521 U.S. 811, 819 (1997), is a matter of great concern to NARCA and its members. The Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601-2617 ("RESPA"), is not the only federal statute under which courts have allowed awards of damages in the absence of injury-in-fact. NARCA members are regularly involved in the lawful collection of past-due consumer debts, and must therefore interpret and apply the requirements of applicable collection law, principally the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("the FDCPA"). Not surprisingly, many of NARCA's members have been and are defendants in lawsuits brought under the FDCPA. In many of these lawsuits, and in many others brought against other types of debt-collector defendants, damages and attorney's fees have been awarded without the requirement of pleading or proof of any actual injury to the plaintiff or plaintiff class. NARCA thus has a keen interest in urging the Court to enforce the standing requirements of U.S. Const., Art. III, § 2, and to require proof of "injury in fact" before damages or fees may be awarded in an action brought under a federal statute.

NARCA has participated as *amicus curiae* in other cases before the Court involving issues of interest to its members. *See, e.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ___, 130 S. Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995).

SUMMARY OF ARGUMENT

The holding of the Ninth Circuit that a plaintiff suing under RESPA need not allege that the challenged conduct affected the price, quality or other characteristics of the services they paid for should be rejected for the ample reasons put forth by Petitioner. NARCA's purpose in submitting this brief is to advise the Court that this holding has broader implications. Its members, and others who collect consumer debts, are frequently subjected to lawsuits under the FDCPA that are governed by similar holdings—that is, in which courts award "statutory" damages, as well as attorney fees, without requiring any allegation or proof of actual injury at all, economic or otherwise.

NARCA would direct the Court's attention to two distinct and unfortunate consequences of the absence of an "injury-in-fact" requirement in FDCPA cases. First, a sampling of awards in FDCPA cases illustrates the perverse results that can occur when Article III's requirement that an injury be pled and proved before damages can be awarded is not enforced. Second, the availability of damages in the absence of injury not only supports "the 'cottage industry' of litigation that has arisen out of the FDCPA," *see Jerman*, 559 U.S. at ___, 130 S.Ct. at 1631 (Kennedy, J., joined by Alito, J., dissenting) (citation omitted); it has actually fueled the growth of that "industry" as plaintiff's lawyers openly advertise the availability to the uninjured of awards of money and a free lawyer. The standing requirements of Article III were designed to prevent just this sort of decoupling of legal claims from real harm.

ARGUMENT

When a plaintiff has not sustained any actual injury, his or her only interest in the case is in the outcome of the suit, an interest that is insufficient to confer standing. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). Like RESPA, the FDCPA operates in just such a fashion, permitting plaintiffs who have neither claimed nor proved that they suffered any injury to recover not only statutory damages in some amount, but also attorney fees. Standing requires injuries that are "concrete" and "not conjectural or hypothetical." *Vermont Agency*, 529 U.S. at 771 (citation and internal quotation marks omitted). By contrast, allowing undamaged plaintiffs to recover "damages" results in awards of money based on technical and harmless violations. It has also created a "cottage industry" of litigation for the sake of litigating, in which lawsuits are filed to generate artificial awards of damages and consequent awards of attorney fees rather than to remedy actual harm, which often is not, because it need not be, claimed at all.

I. ALLOWING AWARDS OF DAMAGES UNDER THE FDCPA WITHOUT REQUIRING PROOF OF INJURY HAS LEAD TO PERVERSE RESULTS IN WHICH DAMAGES AND ATTORNEY FEES ARE AWARDED BASED ON TECHNICAL AND HARMLESS VIOLATIONS.

The FDCPA allows plaintiffs to recover "actual damages sustained," 15 U.S.C. § 1692k(a)(1), as well as either "such additional damages as the court may allow, but not exceeding $1,000" for an individual, or, in the case of a class action, "such amount as the

court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of" the defendant, § 1692k(a)(2)(A) and (B). Plaintiffs and plaintiff classes in cases brought under the FDCPA are routinely allowed to recover so-called "statutory damages" under § 1692k(a)(2) without regard to whether they have pled or proved any "actual damages sustained" under §1692k(a)(1). *See, e.g., Jacobson v. Healtcare Fin. Servs., Inc.*, 516 F.3d 85, 96 (2d Cir. 2008); *Fed. Home Loan Mtge. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007); *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir. 1982). And prevailing plaintiffs, including those who only recover so-called "statutory damages" under § 1692k(a)(2), may also recover "the costs of the action, together with a reasonable attorney's fee as determined by the court" under §1692k(a)(3). *See Savino v. Computer Credit, Inc.*, 164 F.3d 81, 87 (2d Cir. 1998) ("Where a plaintiff prevails, whether or not he is entitled to an award of actual or statutory damages, he should be awarded costs and reasonable attorney fees in amounts to be fixed in the discretion of the court"); *Thornton v. Wolpoff & Abramson, LLP*, 2008 WL 185517, at *2-*3 (11th Cir. January 23, 2008) (plaintiff who recovered no actual damages but $1 in statutory damages entitled to attorney fees).

Cases decided under the FDCPA provide some illuminating examples of how far courts will stray from the notion that federal lawsuits should redress injuries that are concrete and not conjectural. In *Savino v. Computer Credit, Inc.*, 990 F.Supp. 159 (E.D.N.Y. 1998), *aff'd in relevant part*, 164 F.3d 81 (2nd Cir. 1998), wherein no actual damages were claimed, the District Court awarded $500 in

statutory damages—and, of course, attorney fees—based on plaintiff's receipt of a single letter that contained no threat of action and "which the plaintiff may not have read." 990 F.Supp. at 162, 166. In *Richard v. Oak Tree Group, Inc.*, 2008 WL 5060319, at *9 (W.D. Mich. November 21, 2008), a plaintiff whose actual damages claims had been rejected was awarded statutory damages of $50—and, of course, attorney fees—based on a single letter that failed to break down parts of a "balance owed" figure into the actual balance owed and a collection fee.[2] Plaintiffs were, in fact, contractually required to pay that fee and did owe the balance, and when they wrote back the defendant provided them with the correct breakdown "within days after the request." *Id.* at *9.

The *reductio ad absurdum* of the rule that a plaintiff can pursue an FDCPA claim despite having suffered no actual injury may be *Ehrich v. I.C. System, Inc.*, 681 F.Supp.2d 265 (E.D.N.Y. 2010). In that case the court ruled that the FDCPA was violated by a letter that properly explained in English how to dispute a debt in writing, as was required by law, but that also contained a sentence in Spanish that simply invited the recipient to call a toll-free number with any "questions" regarding the debt. *Id.* at 268 and n. 1. The court held that the plaintiffs had standing to claim that the Spanish sentence "overshadowed" the admittedly correct

---

[2] The District Court ultimately awarded attorney fees, but reduced the requested fees by 85%. *Richard v. Oak Tree Group, Inc.*, 2009 WL 3234159 (W.D. Mich. September 30, 2009). Nonetheless, the defendant was also required to bear its own expenses to litigate class certification and summary judgment, to brief the issue of statutory damages (which was tried to the court) and to litigate the fee petition.

English instructions on how to dispute a debt despite the fact that the plaintiffs "are English-speakers, not Spanish-speakers, and were therefore not affected by the Spanish sentence contained in the debt collection letter." *Id.* at 269. The court called the result "somewhat anomalous," but relied on *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), for the proposition that Congress was permitted to enact statutes that created legal rights that, if invaded, "create[d] constitutional standing." *Ehrich*, 681 F.Supp.2d at 269 n. 6 (citing *Linda R.S.*, 410 U.S. at 617 n. 3). But the court cited no invasion of *the plaintiffs'* legal rights based on a sentence they could not even read; instead it held that "the FDCPA. . . focus[es] on a debt collector's misconduct, and not on whether a plaintiff can demonstrate actual damages." *Ehrich*, 681 F.Supp.2d at 270 (citation omitted). The *Ehrich* court could not really be blamed for standing Article III's requirement of actual injury on its head in ruling that standing depended on what the defendant did rather than on how it affected the plaintiff; it had ample governing authority from the courts of appeals to cite to that effect, including *Jacobson* and *Keele*. *See Ehrich*, 681 F.Supp.2d at 270.

Even absent either actual or statutory damages, plaintiffs may be allowed to recover attorney fees if they "prevail" by establishing a violation of the FDCPA. Compare *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (attorney fees awarded despite no award of actual or statutory damages "[b]ecause the FDCPA was violated"), with *Johnson v. Eaton*, 80 F.3d 148, 151-52 (5th Cir. 1996) (attorney fees not available under FDCPA to plaintiff who recovers neither actual nor statutory damages). This conflict is undoubtedly due in part to the absence of a proper standing requirement, as courts

struggle with the notion of awarding attorney fees to plaintiffs who have not proved (and often not even claimed) that they were harmed. Although attorney fee awards are legally distinct from damages awards, to NARCA's members that have been sued under the FDCPA the distinction means little, especially in cases where little or no damages have been awarded. In either case, a defendant is required to pay money as a result of claims made by a plaintiff who has not proved that the defendant harmed him or her, as Article III requires. For example, in *Fasten v. Zager*, 49 F.Supp.2d 144 (E.D.N.Y. 1999), the plaintiff had received a debt collection letter from an attorney about an unpaid medical bill. The District Court rejected several challenges to the contents of the letter under the FDCPA, but found one violation: while credit reporting agencies may retain adverse credit information on a debtor's credit report for *seven* years, *see* 15 U.S.C. § 1681c, the letter the defendant sent to the plaintiff said such information could be retained for *five* years. 49 F.Supp.2d at 150. The court called the violation "minor, if not *de minimus*," and thought there was "no reason to believe that the defendant's error would have any effect on [the plaintiff]." *Id* at 150-521. The court declined even to award statutory damages, but held that it was nonetheless required by governing Second Circuit law to invite an application for fees. *Id*. at 151.

Indeed, in a case the Court heard on another issue, the plaintiff is seeking just such a windfall—an award of attorney fees in the absence of either actual or statutory damages. After the Court decided *Jerman*, the District Court on remand granted summary judgment to the plaintiff on the underlying FDCPA claim but denied her request for statutory

damages. (She had not sought any actual damages.) Memorandum of Opinion and Order, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 59 (N.D. Oh. April 14, 2011). While Ms. Jerman has appealed that ruling, she claims regardless that her action was "successful" and is seeking more than $343,000 in attorney fees and costs, Plaintiff's Motion for an Award of Costs and Attorney Fees, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 62 (N.D. Oh., filed May 3, 2011), as well as a $3,000 "incentive award" for recovering neither actual nor statutory damages for the class of plaintiffs in her case, Plaintiff's Motion for an Incentive Award, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, Case No. 1:06-cv-01397-PAG, ECF Doc. # 61 (N.D. Oh., filed May 3, 2011).

Cases like these demonstrate that permitting damages claims to survive without requiring that there be any actual injuries results in the entry of judgments based on less than even the hypothesis or conjecture that the Court decried as inadequate in *Vermont Agency*. None of the plaintiffs in the cases cited above, or in other cases where damages or attorney fees were awarded in the absence of what the FDCPA itself, apparently without irony, calls "actual damages," suffered any real harm as a result of the conduct on which their claims were grounded. Indeed, because they are not required to do so, many plaintiffs in FDCPA cases do not even allege actual injury.

II. THE ABSENCE OF A REQUIREMENT OF ACTUAL INJURY IN FDCPA CASES HAS SPAWNED A "COTTAGE INDUSTRY" OF LITIGATION DESIGNED TO GENERATE ATTORNEY FEES RATHER THAN REDRESS REAL HARM.

The dissenting Justices in *Jerman* lamented the ability of "certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." *Jerman*, 559 U.S. at ___, 130 S.Ct. at 1631 (Kennedy, J., joined by Alito, J., dissenting). They were hardly the first to make this observation. In the opinion they cited, *Lamar*, 503 F.3d at 513, the Sixth Circuit quoted at length from observations made by Judge Glasser of the Eastern District of New York regarding the requirement that courts in FDCPA cases apply the so-called "least sophisticated consumer" standard:

> Ironically, it appears that it is often the extremely sophisticated consumer who takes advantage of the civil liability scheme defined by this statute, not the individual who has been threatened or misled. The cottage industry that has emerged does not bring suits to remedy the "widespread and serious national problem" of abuse that the Senate observed in adopting [the FDCPA], . . . nor to ferret out collection abuse in the form of "obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumer's personal affairs to friends, neighbors, or an employer, obtaining information about a consumer through false pretense, impersonating public officials and

> attorneys, and simulating legal process." Rather, the inescapable inference is that the judicially developed standards have enabled a class of professional plaintiffs. . . .

Jacobson v. Healthcare Fin. Servs., Inc., 434 F.Supp.2d 133, 138-39 (E.D.N.Y 2006) (citations omitted), *aff'd in part and rev'd in part on other grounds*, 516 F.3d 85 (2d Cir. 2008).

As NARCA's members know all too well, statistics bear out these observations. In 2006, 3,710 lawsuits were filed under the FDCPA, but the number has grown steadily to 10,914 in 2010. *See Nearly 11,000 FDCPA Lawsuits Filed In 2010*, http://www.insidearm.com/daily/collection-laws-regulations/fdcpa/nearly-11000-fdcpa-lawsuits-filed-in-2010/ (last visited August 29, 2011). The tripling of case filings in just five years should come as no surprise given the incentives created by a claim that requires no proof of harm; when free money is made available, people will usually come around to try to get some. This is especially true if the free money is well advertised. Plaintiffs' lawyers actively solicit potential clients by trumpeting just how little the FDCPA asks of them in order to produce an award of money. One lawyer candidly tells potential clients that they may be entitled to "[p]roveable actual damages . . . [i]f a debt collector's abuse has caused you to cry or lose sleep . . ." but that they can get up to $1,000 without having to "prove that you suffered any actual harm," and adds that "[p]robably the most important remedy under the FDCPA" is "[a] free attorney." The Todd Murray Law Firm, *Five Reasons To Sue A Debt Collector That Violates The FDCPA*, http://toddmurraylaw.com/tag/fdcpa/ (last visited August 29, 2011). Another assures potential clients that "a

consumer does not have to prove actual damages in order to file a claim." Anderson & Associates, *Fair Debt Collection Practices Act*, http://www.at lawhelp.com/fair-debt-collection-practices-act.html (last visited August 29, 2011). In this way the lack of an Article III standing requirement in FDCPA cases has become more than simply an aspect of litigating under that statute; it is the driver of an explosion of litigation designed not to remedy "concrete" injuries, but instead to reward unharmed plaintiffs and their lucky lawyers. As this trend continues—6,348 new FDCPA cases have already been filed between January 1 and July 15 of this year (see *FDCPA And Other Consumer Lawsuit Statistics, July 1-15, 2011*, http://webrecon.com/b/news-and-stats/ (last visited August 29, 2011))—the distance between the legitimate goals of the FDCPA and the artificial damages and fee awards being handed out under it will continue to grow.

NARCA respectfully submits that enforcement of Article III's strict requirement of actual injury is the proper remedy for this problem. It will eliminate windfalls to the uninjured while allowing genuinely harmed plaintiffs to vindicate their rights under RESPA, the FDCPA and other statutes under which courts currently allow plaintiffs to recover damages without being damaged. And it will strike from the docket of the federal courts a host of lawsuits that invite remedies inconsistent with the case and controversy limits of the Constitution.

CONCLUSION

For the reasons set forth above, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

DAVID M. SCHULTZ
JOEL D. BERTOCCHI
Counsel of Record
STEPHEN R. SWOFFORD
MATTHEW T. GLAVIN
AVANTI D. BAKANE
HINSHAW & CULBERTSON, LLP
222 North LaSalle Street
Suite 300
Chicago, IL 60601
(312) 704-3000
JBertocchi@hinshawlaw.com

AMICUS CURIAE BRIEF

No. 10-708

In the
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

Counsel for Amici Curiae

Robin S. Conrad
Kathryn Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States of America

Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

August 29, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. AN INDIVIDUAL WHO ALLEGES ONLY A VIOLATION OF A STATUTORY RIGHT, WITHOUT ANY RESULTING CONCRETE INJURY, CANNOT ESTABLISH STANDING UNDER ARTICLE III. 8

II. THE NINTH CIRCUIT DISREGARDED THIS COURT'S EXPLANATION IN *LUJAN* THAT THE INVASION OF A LEGAL RIGHT MUST CAUSE CONCRETE INJURY TO ESTABLISH ARTICLE III STANDING 13

III. BY CONFLATING STATUTORY STANDING WITH CONSTITUTIONAL STANDING, THE NINTH CIRCUIT HAS RELINQUISHED THE JUDICIARY'S POWER AND DUTY "TO SAY WHAT THE LAW IS." 18

IV. THE NINTH CIRCUIT'S DECISION, VIOLATES THE SEPARATION OF POWERS BECAUSE IT ALLOWS AN INDIVIDUAL WHO HAS SUFFERED NO INJURY IN FACT TO ENFORCE GENERAL STATUTORY DUTIES IN COURT. 21

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984) 17, 23

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d. Cir. 2009) 14, 17

Carter. v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 14, 17

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 22

Edwards v. First Am. Fin. Corp., 610 F.3d 514 (9th Cir. 2010) ..... passim

Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004). 9

Havens Realty v. Coleman, 455 U.S. 363 (1982). 6, 14, 17, 18

Lewis v. Casey, 518 U.S. 343 (1996) 11, 22

Linda R. S. v. Richard D., 410 U.S. 614 (1973). 14, 15

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) ..... passim

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) ..... passim

Raines v. Byrd, 521 U.S. 811 (1997) 10, 11, 22

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 10, 13

Summers v. Earth Island Inst., 129 S.Ct. 1142 (2009) 10, 11, 16

U.S. v. Burke, 504 U.S. 229 (1992) 17

Warth v. Selden, 422 U.S. 490 (1975) 5, 14, 15

Constitutional Provisions and Statutes

U.S. Const. art. II, § 3 ..... passim

U.S. Const. Art. III, § 2 ..... passim

12 U.S.C. §§ 2601 *et seq*. ..... passim

12 U.S.C. § 2607(a) 9

12 U.S.C. § 2607(d)(1) 27

12 U.S.C. § 2607(d)(2) 9, 12

12 U.S.C § 2607(d)(4) 27

12 U.S.C. § 2607(d)(6) 28

12 U.S.C. § 2614 27

12 U.S.C. § 2616 28

12 U.S.C. § 2617 27

Miscellaneous

James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1 (2001) 25, 27

Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547 (1995) 18, 19

Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169 (2008)..... 26

INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF"), Associated Industries of Massachusetts ("AIM"), and Chamber of Commerce of the United States of America ("the Chamber") seek to present their views, and the views of their supporters, on the issue whether Article III, § 2 of the United States Constitution, which limits the federal judiciary's jurisdiction to "cases" and "controversies," should confer standing on an individual who alleges only the violation of a federal statutory right but who cannot establish that she suffered any concrete, particularized injury caused by the alleged violation.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, amicus notes that on July 11 and August 12, 2011, counsel for petitioners and counsel for respondent respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM was founded in 1915 and is a nonprofit association incorporated in Massachusetts under Chapter 180 of the Massachusetts General Laws, and designated under the Internal Revenue Code (26 U.S.C. §501 (c)(6)) as a not-for-profit entity. AIM's mission is to promote the well-being of its members and their employees and the prosperity of the Commonwealth of Massachusetts by: improving the economic climate of Massachusetts; proactively advocating fair and equitable public policy; and providing relevant, reliable information and excellent services. AIM does not issue stock or any other form of securities and does not have any parent corporation. AIM is governed by a self-perpetuating Board of Directors.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's business community.[2] The Chamber also regularly appears as amicus curiae in cases that raise issues of vital concern to the Nation's business community as a whole.[3] This is such a case, and amici believe that this brief provides an additional perspective to aid the Court in deciding the issue presented within.

---

[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r v. Banks*, 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

[3] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

SUMMARY OF ARGUMENT

An individual who claims the violation of a statutory right cannot establish Article III standing unless she can also show that the violation caused her to suffer a concrete and personal injury. In this case, the Ninth Circuit has interpreted the applicable statute, the anti-kickback provision of the Real Estate Settlement Procedures Act, ("RESPA"), 12 U.S.C. §§ 2601 *et seq.*, as providing a private remedy for a bare violation of the law. Where Congress purportedly does not require injury in fact, and the plaintiff has failed to allege any, Article III is not satisfied and the case should be dismissed for lack of jurisdiction.

Article III injury requires an independent judicial determination that has nothing to do with the applicable statute. Applying this independent standard of review, the Court has repeatedly denied Article III standing where, as here, the plaintiff who has suffered no concrete injury sues under a statute that purports to discard this fundamental constitutional requirement of standing.

Despite the Court's clear precedent requiring independent judicial determination of the existence of injury in fact, the Ninth Circuit nevertheless concluded that the text of RESPA could, by itself, create Article III jurisdiction, without the need for such a judicial determination. The apparent source of the Ninth Circuit's error is its misinterpretation of

the Court's language, from earlier decisions, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Selden*, 422 U.S. 490, 500 (1975). The Ninth Circuit apparently interpreted this language to mean that statutory standing is simply coextensive with constitutional standing, and that a court need only consult the text of the statute to find injury in fact. In misapplying the Court's "invasion of rights" formulation of standing, the Ninth Circuit, and other lower federal courts, have apparently disregarded *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, the Court explained that the invasion of a statutory right can establish Article III standing, but only if the statutory violation corresponds with, and gives legal recognition to, a concrete, identifiable injury that exists apart from the statute. *Id.*, 504 U.S. at 578.

The RESPA claim at issue in this case fails the *Lujan* framework. Under *Lujan*, Article III would require the homebuyer to show that she suffered a concrete and identifiable harm from a violation of statutory duties pertaining to the market behavior of real estate settlement service providers. Where, as here, it is undisputed that there was no economic harm, and no other form of concrete injury has been identified, there can be no injury in fact. Therefore, the jurisdictional

requirements of Article III have not been satisfied.

Just as the Ninth Circuit, and other lower federal courts, have misinterpreted the "invasion of rights" language as eliminating the independent constitutional requirement of injury in fact, so too have the courts misapplied the Court's decision in *Havens Realty v. Coleman*, 455 U.S. 363 (1982). Contrary to the lower courts' views, the Court's decision in *Havens Realty* does not establish that statutory standing automatically satisfies constitutional standing. Instead, *Havens Realty* is consistent with *Lujan* because the statutory injury at issue in *Havens Realty* apparently entailed a concrete harm, namely the dignitary harm inherent in virtually any form of discrimination. *Havens Realty* is therefore consistent with *Lujan* and should provide no support for the position that statutory standing automatically establishes constitutional standing.

The Ninth Circuit's interpretation of Article III conflates statutory standing with constitutional standing. In so doing, the lower court's decision not only disregards *Lujan* but also runs afoul of the judiciary's exclusive power and duty to interpret the Constitution and "say what the law is," as established famously in *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). According to the Ninth Circuit, Article III standing is simply a matter

of statutory construction. If Congress has prohibited the violation of a statutory duty, then the constitutional requirement of "injury in fact" is summarily satisfied. According to the Ninth Circuit, then, a "case" or "controversy" under Article III is simply what Congress says it should be. The meaning of those key constitutional terms is to be decided by the majoritarian will of Congress, and not by the judiciary. Simply put, under the Ninth Circuit's view, Congress has virtually boundless powers to expand the judiciary's jurisdiction. Federal courts should defer to the language of a statute, and not the Constitution, to define the limits of their jurisdiction.

This cannot be. The Ninth Circuit's interpretation of Article III would have the judiciary relinquish its exclusive institutional power and responsibility to interpret and enforce the Constitution—i.e., to "say what the law is," and hold the other branches accountable to this supreme document, as the Court established long ago in *Marbury v. Madison*, 5 U.S., at 176-78. To the contrary, the Court alone has the authority and the duty to determine the meaning of Article III's definition of the federal judiciary's jurisdiction. This is not a question to be decided by Congress. And, having interpreted the limits of federal jurisdiction under Article III, the Court should then enforce those limits on the power of Congress.

The Ninth Circuit's decision offends the separation of powers among all three branches of government, a bedrock principle of checks and balances that the Court has embraced as a foundational theory in its Article III jurisprudence. In this case, an individual who has not suffered any injury in fact seeks, in court, to vindicate the general public interest in the enforcement of RESPA. Granting standing under those circumstances would not only exceed Article III's jurisdictional limits but it would also implicate the exclusive constitutional power of the Executive Branch to "take Care that the Laws be faithfully executed." Art. II, § 3. The separation of powers forbids Congress from converting the general public interest in enforcement of the law, which is ordinarily pursued through the political process, into a private right of action for the uninjured plaintiff. *Lujan*, 504 U.S. at 576-77.

ARGUMENT

I. AN INDIVIDUAL WHO ALLEGES ONLY A VIOLATION OF A STATUTORY RIGHT, WITHOUT ANY RESULTING CONCRETE INJURY, CANNOT ESTABLISH STANDING UNDER ARTICLE III.

At issue in this case is whether Article III, § 2 of the United States Constitution, which

limits the federal judiciary's jurisdiction to "cases" and "controversies," confers standing on an individual who alleges the violation of a statutory right but who cannot show that the violation caused her any concrete injury.[4] In this case, the Ninth Circuit has interpreted the applicable statute, the anti-kickback provision of the Real Estate Settlement Procedures Act, ("RESPA"), 12 U.S.C. §§ 2601 *et seq.* as providing a private remedy for a bare violation of the law. *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 516-17 (9th Cir. 2010).[5]

Consequently, the lower court concluded that Article III was satisfied even though Congress does not require, and the respondent,

---

[4] It goes without saying that "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

[5] For the sake of this brief only, amici will assume *arguendo* that the Ninth Circuit's interpretation of RESPA is correct, and that Congress has provided a private remedy based solely on a violation of the law.

RESPA bars the payment of "any fee, kickback, or thing of value" in exchange for the referral to "a real estate settlement service involving a federally related mortgage loan . . . ." 12 U.S.C. § 2607(a). RESPA allows any homebuyer who has purchased "a settlement service involved in the violation" to recover treble the cost of the settlement service, plus reasonable attorney's fees, from anyone who committed the violation. 12 U.S.C. § 2607(d)(2).

Denise P. Edwards, has not shown, that the invasion of her statutory rights has caused her any actual injury.[6] The stark question becomes whether Article III jurisdiction can be established where, as here, any trace of concrete injury has been eliminated by joint operation of the law and the record.

This question covers familiar ground and warrants a resolute answer in the negative. As the Court has made abundantly clear, Article III does not countenance injury in the abstract and instead requires "injury in fact," i.e., a "concrete and particularized" harm, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), which "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). Injury in fact is simply "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151 (2009). *See also Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing . . . ."). Simply put, a

---

[6] As the Ninth Circuit observed in this case, Edwards cannot show any economic injury from the alleged violation of RESPA, "because Ohio law [her state of residence] mandates that all title insurers charge the same price." *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 516.

statutory violation must cause injury in fact to satisfy Article III. *See Lewis v. Casey*, 518 U.S. 343, 353, n.4 (1996).

Consequently, Article III injury is a threshold jurisdictional determination requiring independent judicial scrutiny to determine whether the plaintiff suing under a statute has suffered concrete injury, apart from any statutory violation or remedy. Applying this independent standard of review, the Court has repeatedly denied Article III standing where, as here, the plaintiff who has suffered no concrete injury sues under a statute that purports to discard this fundamental constitutional requirement for standing. *See Summers v. Earth Island Inst.*, at 1151 (environmental organizations had no Article III standing to sue U.S. Forest Service under applicable federal law to enjoin enforcement of disputed regulation because organizations' members failed to identify any resulting concrete injury, and because "deprivation of a procedural right without some concrete interest that is affected by the deprivation--a procedural right *in vacuo*--is insufficient to create Article III standing. . . [I]t *makes no difference that the procedural right has been accorded by Congress.*") (emphasis added). *See also Raines v. Byrd*, 521 U.S. at 821 (members of Congress had no Article III standing to sue under Line Item Veto Act because broad statutory remedy did not require any concrete injury, and

because plaintiffs alleged only a general, institutional injury, rather than the loss of any private right); *Lujan*, 504 U.S. at 573 (environmental groups suing Secretary of Interior under broad citizen-suit provision of Endangered Species Act had no Article III standing because they did not allege any concrete injury, and because "the injury-in-fact requirement [could not be] satisfied by congressional conferral upon all persons of an *abstract, self-contained, noninstrumental* 'right' to have the Executive observe the procedures required by law.") (emphasis added). These cases clearly illustrate the basic principle that a claim based solely on the violation of a statutory duty cannot establish the jurisdictional requirement of injury in fact under Article III, regardless of whether Congress has adorned such an inchoate claim with a private remedy for damages.

In light of this clear precedent, Edwards's claim should be dismissed for lack of jurisdiction under Article III. As already noted above, neither the RESPA provision at issue nor her allegations can establish the necessary injury in fact. The RESPA provision, 12 U.S.C. § 2607(d)(2), establishes liability for any homebuyer who has purchased "a settlement service involved in the violation," as opposed to a settlement service that has been *affected* in some measurable way by the violation. The provision is closely analogous to the statutes at

issue in *Lujan* and its progeny, discussed above, because it apparently affords a private remedy for a violation of the law without requiring any resulting, concrete injury. Article III, however, bars a federal court from exercising jurisdiction over a statutory violation that does not affect the individual's rights in some direct, palpable way. After all, "federal courts sit "solely, to decide on the rights of individuals . . . ." *Marbury v. Madison*, 1 Cranch 137, 170, 2 L.Ed. 60 (1803). Because Edwards has not suffered any identifiable injury from the alleged violation of RESPA, her claim should be dismissed for lack of jurisdiction.

II. THE NINTH CIRCUIT DISREGARDED THIS COURT'S EXPLANATION IN *LUJAN* THAT THE INVASION OF A LEGAL RIGHT MUST CAUSE CONCRETE INJURY TO ESTABLISH ARTICLE III STANDING.

Despite the clarity of the Court's precedent requiring an independent judicial determination of Article III injury that "has nothing to do with the text of the statute relied upon," *Steel Co.*, 523 U.S. at 97 n.2, the Ninth Circuit nevertheless concluded in this case that "the text of the statute relied upon" was alone sufficient to establish Article III standing.

Edwards v. First Am. Fin. Corp., 610 F.3d 514, 517 (9th Cir. 2010). The apparent source of the Ninth Circuit's error is its misinterpretation of the Court's language, from earlier decisions, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Selden*, 422 U.S. at 500 (internal citation omitted). The Ninth Circuit apparently interpreted this language to mean that statutory standing is simply coextensive with constitutional standing, and that a court need only consult the text of the statute to find injury in fact. The Third and Sixth Circuits have apparently committed the same error of interpretation in finding Article III standing under the identical anti-kickback RESPA provision.[7]

In misapplying the Court's "invasion of rights" formulation of standing, these lower courts have apparently disregarded the Court's

---

[7] *See Carter. v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988 (6th Cir. 2009) ("Congress . . . generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right") (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973)); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d. Cir. 2009)("A plaintiff need not demonstrate that he or she suffered actual monetary damages, because 'the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

explanation, in *Lujan*, that harmonizes the formulation with the requirement of injury in fact. *Lujan*, 504 U.S. at 578. As the Court explained in *Lujan*, its formulation in *Warth v. Selden* meant that the invasion of a statutory right can establish Article III standing, but only if the statutory violation corresponds with, and gives legal recognition to, a concrete, identifiable injury that exists apart from the statute. As the Court stated:

> Nothing in this [discussion of Article III standing] contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' *elevating to the status of legally cognizable injuries concrete, de facto injuries* that were previously inadequate in law . . . .

Lujan, 504 U.S. at 578 (emphasis added).

Thus, *Lujan* establishes that the invasion of a statutory right satisfies Article III

only if it is based on a preexisting, *de facto* harm and transforms it into a *de jure* injury. Contrary to the view of the Ninth Circuit and other federal courts, then, *Lujan* reinforces the principle that the invasion of a statutory right must cause, or at least be associated with, an injury in fact to establish Article III standing.

The Ninth Circuit, in failing to consider *Lujan*, conflated statutory standing with constitutional standing. *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 517. In so doing, the lower court discarded the essential requirement of injury in fact, contrary to the Court's pronouncement that injury in fact is "a hard floor of Article III jurisdiction that *cannot be removed by statute.*" *Summers v. Earth Island Inst.*, 129 S.Ct. at 1151 (emphasis added).

The RESPA claim at issue in this case fails the *Lujan* framework. Under *Lujan*, Article III would require the homebuyer to show that she suffered a concrete and identifiable harm from a violation of statutory duties pertaining to the market behavior of real estate settlement service providers. Where, as here, proof of any economic harm is foreclosed, and no other form of *de facto* injury has been identified, there can be no injury in fact, and jurisdiction should be denied.

Just as the Ninth Circuit misinterpreted the "invasion of rights" language as eliminating the independent constitutional requirement of injury in fact, so too did it misapply the Court's

decision in *Havens Realty v. Coleman*, 455 U.S. 363 (1982). Other lower federal courts have also apparently misinterpreted that case. *See Carter. v. Welles-Bowen Realty, Inc., 553 F.3d 979, 989* (6th Cir. 2009); *Alston v. Countrywide Fin. Corp., 585 F.3d 753, 763 (3d. Cir.* 2009).[8]

Contrary to the Ninth Circuit's view, the Court's decision in *Havens Realty* does not establish that statutory standing automatically satisfies constitutional standing. Instead, *Havens Realty* is consistent with *Lujan* because the alleged statutory injury at issue in *Havens Realty* apparently entailed a concrete, *de facto* harm--namely the dignitary harm inherent in most forms of discrimination. See *Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting "the stigmatizing injury often caused by racial discrimination"). *See also U.S. v. Burke*, 504 U.S. 229, 241 n.12 (1992) (discussing Congressional findings concerning Civil Rights Act of 1991, and noting that "'[m]onetary damages also are necessary to make

---

[8] In *Havens Realty*, an African-American "tester" of discriminatory housing practices allegedly received false, race-based information on the unavailability of housing, in violation of the Fair Housing Act's broad prohibition against false, discriminatory representations concerning housing availability. *Id.*, 455 U.S. at 368-69. The Court, applying the "invasion of rights" language discussed above, held that the tester had Article III standing, even though he had no intention of renting and may have expected to receive the false information. *Havens Realty*, 455 U.S. at 373-74.

discrimination victims whole for the terrible injury to their careers, to their *mental and emotional health*, and to their *self-respect and dignity*'") (quoting H.R.Rep. No. 102-40, pt. 1, pp. 64-65 (1991), U.S.Code Cong. & Admin.News 1991, pp. 549, 602, 603 (Report of Committee on Education and Labor)) (emphasis added); Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547, 577 (1995) (discussing *Havens Realty* in light of common-law dignitary tort). In short, *Havens Realty* is consistent with *Lujan* and should therefore provide no support for the position that statutory standing automatically establishes constitutional standing.

III. BY CONFLATING STATUTORY STANDING WITH CONSTITUTIONAL STANDING, THE NINTH CIRCUIT HAS RELINQUISHED THE JUDICIARY'S POWER AND DUTY "TO SAY WHAT THE LAW IS."

As noted above, the Ninth Circuit's interpretation of Article III in this case conflates statutory standing with constitutional standing. In so doing, the lower court's decision not only disregards *Lujan* but also runs afoul of the judiciary's exclusive power and duty to interpret the Constitution and "say what the law is," as established famously in *Marbury v.*

Madison, 1 Cranch at 177. According to the Ninth Circuit, Article III standing is simply a matter of statutory construction. If Congress has prohibited the violation of a statutory duty, then the constitutional requirement of "injury in fact" is summarily satisfied. In the Ninth Circuit's view, "we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III." *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 517.

According to the Ninth Circuit, then, a "case" or "controversy" under Article III is simply what Congress says it should be. The meaning of those key constitutional terms is to be decided by the majoritarian will of Congress, and not by the judiciary. But this view would mean that Congress has virtually boundless powers to expand the judiciary's jurisdiction, and that federal courts should defer to Congress, and not the Constitution, to define the limits of their jurisdiction. Under such a view, Article III's limits are no more. *See* Rosman, *Standing Alone*, 60 Mo. L. Rev. at 578 ("[I]f Congress . . . creates a legal right the violation of which will meet the injury 'in fact' requirement, it can indeed 'abrogate' the Article III minima because the Court will not examine the 'factual' existence of an 'injury' beyond the violation of a legal right.").

This cannot be. The Ninth Circuit would have the judiciary relinquish its exclusive institutional power and responsibility to interpret and enforce the Constitution—i.e., to "say what the law is," and to hold the other branches accountable to this supreme document, as the Court established long ago in *Marbury v. Madison*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written . . . [as] the fundamental and paramount law of the nation. . . . It is emphatically the *province and duty of the judicial department to say what the law is*. . . . This is of the very essence of judicial duty. . . . [I]f the legislature shall do what is expressly forbidden [by the Constitution], . . . [i]t would be giving to the legislature a practical and real omnipotence . . . .

Marbury v. Madison, 5 U.S., at 176-78 (invalidating federal statute that exceeded Article III's exclusive bases for Court's original jurisdiction) (emphasis added).

Simply put, as *Marbury v. Madison* established, the Court alone has the authority and the duty to determine the meaning of

Article III's definition of the federal judiciary's jurisdiction. This is not a question to be decided by Congress. And, having interpreted the limits of federal jurisdiction under Article III, the Court should then enforce those limits on the power of Congress.

IV. THE NINTH CIRCUIT'S DECISION, VIOLATES THE SEPARATION OF POWERS BECAUSE IT ALLOWS AN INDIVIDUAL WHO HAS SUFFERED NO INJURY IN FACT TO ENFORCE GENERAL STATUTORY DUTIES IN COURT.

In this case, an individual who has not suffered any concrete, personal injury seeks to enforce the law in federal court. As amici argue further below, granting standing under those circumstances would not only exceed Article III's limits but it would also implicate the exclusive power of the Executive Branch to "take Care that the Laws be faithfully executed." Art. II, § 3. Consequently, the Ninth Circuit's decision offends the separation of powers among all three branches of government, a bedrock principle of checks and balances that the Court has embraced as a foundational theory in its Article III jurisprudence. "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers[,] . . . th[e] overriding and

time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . ." *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (internal quotations and citation omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the *tripartite allocation of power* set forth in the Constitution.") (internal quotations and citations omitted) (emphasis added); *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) ("[T]his [Article III standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches . . . . That is where the 'actual injury' requirement comes from.").

The Court has stated that the separation of powers forbids Congress from authorizing the judiciary to exceed its limited Article III powers and, in so doing, to intrude upon the exclusive and discretionary power of the Executive Branch to enforce the law, under Art. II, § 3. *See Lujan*, 504 U.S. at 577 ("If the concrete injury requirement has the separation-of-powers significance we have always said, the[n] . . . [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most

important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."). *See also Allen v. Wright*, 468 U.S. at 761 ("Art. III [jurisprudence,] . . . grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3.").

Recognition of standing in this case would not only exceed the judiciary's limited jurisdiction under Article III, but it would also intrude upon the exclusive Article II powers of the Executive Branch to enforce the law on behalf of the general public. As already discussed above, RESPA provides a private right of action based solely on a violation of the law, and Edwards has not identified any concrete injury caused by the alleged violation of RESPA. Article III is readily exceeded in this case because there is no injury in fact. Taking jurisdiction of the case would thus be *ultra vires* of Article III. After all, the judiciary's limited role is to vindicate private rights, to protect the interests of the individual who claims to have suffered a particular injury. *See Marbury v. Madison*, 5 U.S. at 170 ("[T]he

province of the court is, solely, to decide on the rights of individuals . . . ."). No such private injury is identified under either the statute or the respondent's allegations here. Consequently, the federal judiciary has no constitutional role to play and, for this reason alone, should deny jurisdiction.

Article II is also offended here because an uninjured individual effectively seeks, in court, to vindicate the general public interest, in this case pertaining to a market free of kickbacks and paid referrals. However, "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576 (emphasis in original). Article II restricts law enforcement activities to the Executive Branch. *See id.*, 504 U.S. at 577 ("Congress [may not] transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3."). *See also Marbury v. Madison*, 5 U.S. at 170 ("the province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion.").

To be sure, the judiciary must frequently enforce the law, but only as a necessary incident to providing the injured plaintiff with a remedy. *See Marbury v. Madison*, 5 U.S. at 170-73 (plaintiff deprived of vested right to commission entitled, in appropriate court, to

private remedy against Executive Branch to enforce right). *See also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 85 (2001) ("[C]ourts are permitted to interfere in executive processes only to the extent necessary to vindicate individual rights but no more.").

Accordingly, where, as here, a plaintiff alleges a statutory violation without any resulting concrete injury, she presents no redressable grievance under Article III and instead effectively seeks, at the purported invitation of Congress, to enlist the judiciary in the enforcement of the law for the sake of the general public. As the Court recognized in *Lujan*, 504 U.S. at 576-77, the separation of powers forbids Congress from converting the general public interest in enforcement of the law, which is ordinarily pursued through the political process, into a private right of action for the uninjured plaintiff. Under the Ninth Circuit's interpretation of RESPA, Congress has done just that and has effectively delegated the Executive Branch's Article II enforcement powers to private parties and the judiciary. As one commentator has astutely observed, "Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an uninjured plaintiff were to bring an action that rightfully

must be brought only by the executive power, the court would be countenancing a violation of Article II." Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169, 1193 (2008).

While the Court's Article II concerns have so far arisen in the context of statutory citizen-suits against the Executive Branch (*Lujan*, e.g.), those Article II concerns should apply with full force to a private statutory claim, as in this case, that is based solely on a violation of the law. *Lujan* establishes that Congress cannot allow courts, and private parties, to compel the Executive Branch to comply with the law for the sake of the general public. *Id.* at 576-77. This case illustrates the related Article II concern that Congress cannot allow courts and private parties to perform the exclusive role of the Executive Branch in enforcing the law on behalf of the general public. In short,

> Enforcement of the law is a political decision left to the Executive Branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as

> individualized entitlements would disrupt the balance that the Framers created to protect the executive from legislative power.

Leonard & Brant, *The Half-Open Door*, 54 Rutgers L. Rev. at 115.

In sum, the Court in *Lujan* rejected Congress's efforts to allow individuals who have not suffered any injury in fact to seek judicial enforcement of the Executive Branch's statutory duties. Just as Congress cannot empower the courts, and private parties, to tell the administrative agencies how to do their job, Congress should not be able to empower the courts, and private parties. to *do* the exclusive job of the administrative agencies.[9]

---

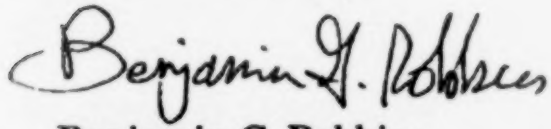
[9] It should be noted that, quite apart from the private statutory remedy at issue here, RESPA generously provides for many appropriate administrative and other avenues for enforcement of RESPA rights, at both the federal and state levels. First, RESPA delegates broad rule-making, investigative, and enforcement powers to the Department of Housing and Urban Development ("HUD"), and authorizes HUD *and* states' attorneys general and insurance commissioners to bring civil actions to enjoin violations of RESPA. 12 U.S.C §§ 2607(d)(4), 2617. RESPA also authorizes criminal actions, with a maximum penalty of $10,000, a one-year sentence, or both. 12 U.S.C. § 2607(d)(1). Moreover, RESPA confers concurrent jurisdiction on state courts to hear RESPA claims, where Article III does not apply. 12 U.S.C. § 2614. Finally, RESPA has an anti-preemption clause and allows states to enact their own RESPA-

CONCLUSION

For the reasons stated above, NELF, AIM, and the Chamber respectfully request that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

New England Legal Foundation and Associated Industries of Massachusetts
By their attorneys,



Benjamin G. Robbins
Counsel of Record
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

Robin S. Conrad
Kathryn Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
Tel: (202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States of America

August 29, 2011

---

related statutes and regulations that can be more stringent than RESPA itself. 12 U.S.C. §§ 2607(d)(6), 2616.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT
FILED
AUG 26 2011
OFFICE OF THE CLERK

No. 10-708

In the
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORP., *et al.*,
Petitioners,
v.
DENISE P. EDWARDS, Individually and on Behalf of Others Similarly Situated,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-mail:
jeastman@chapman.edu
caso@chapman.edu

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and the Center for Constitutional Jurisprudence

Library of Congress
Law Library

QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, Section 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

Does a purchaser of real estate who, without any concrete or actual harm of her own, alleges in a class-action lawsuit technical violations of RESPA by her title insurance company, meet the requirements of Article III's "case or controversy" requirement?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

ARGUMENT 2

I. CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST 2

II. PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION 9

A. "Representative" Plaintiffs Must Have Suffered the Same Injury as the Class They Seek To Represent 9

B. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person 12

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 4

Allee v. Medrano, 416 U.S. 802 (1974) 10

Allen v. Wright, 468 U.S. 737 (1984) 2

Am. Elec. Power Co. v. Connecticut,
131 S. Ct. 1807 (2011) 2

Bailey v. Patterson, 369 U.S. 31 (1969) 10

Bennett v. Spear, 520 U.S. 154 (1997) 1, 5, 8

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 2

Castano v. Am. Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 16

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) . . . 5

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 9, 16

Doe v. Governor, 412 N.E.2d 325 (Mass. 1980) . . . 11

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 2

Ex parte Masonite Corp.,
681 So. 2d 1068 (Ala. 1996) 17

Fernandez v. Takata Seat Belts, Inc.,
210 Ariz. 138 (2005) 10

Gladstone Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 6

TABLE OF AUTHORITIES—Continued

Page

Gonzales v. Carhart, 550 U.S. 124 (2007) 8

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 2

Hamilton v. Ohio Sav. Bank,
694 N.E.2d 442 (Ohio 1998) 11

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 16

In re Bridgestone/Firestone, Inc.,
288 F.3d 1012 (7th Cir. 2002) 17

In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 13, 16

Kid's Care, Inc. v. Alabama Dep't of Human Resources, 843 So. 2d 164 (Ala. 2002) 11

Landesman v. General Motors Corp.,
377 N.E.2d 813 (Ill. 1978) 11

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 1, 5-6

M.D. Anderson Cancer Ctr. v. Novak,
52 S.W.3d 704 (Tex. 2001) 11

Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.,
181 F.R.D. 331 (N.D. Miss. 1998) 17

Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.,
834 F.2d 677 (7th Cir. 1987) 15

Martin v. Wilks, 490 U.S. 755 (1989) 14

TABLE OF AUTHORITIES—Continued

Page

Massachusetts v. EPA, 549 U.S. 497 (2007) 1

Mitchell v. H & R Block, Inc.,
783 So. 2d 812 (Ala. 2000) 17

Morris, Inc. v. Angeletti,
358 Md. 689, 752 A.2d 200 (2000) 17

Newton v. Merrill Lynch,
259 F.3d 154 (3d Cir. 2001) 16-17

North Shore Gas Co. v. EPA,
930 F.2d 1239 (7th Cir. 1991) 15

O'Shea v. Littleton, 414 U.S. 488 (1974) 10

Parker v. Time Warner Entm't Co.,
331 F.3d 13 (2d Cir. 2003) 16-17

People Organized for Welfare & Employment Rights v. Thompson,
727 F.2d 167 (7th Cir. 1984) 15

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 13

Raines v. Byrd, 521 U.S. 811 (1997) 7

Savannah R-III School Dist. v. Public School Retirement System of Mo.,
950 S.W.2d 854 (Mo. 1997) 11

Schaffer v. O'Neil, 534 U.S. 992 (2001) 5

Sierra Club v. Morton, 405 U.S. 727 (1972) 6-7

Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 5-6

TABLE OF AUTHORITIES—Continued

Page

Smith v. Bayer Corp., 131 S. Ct. 2368 (2011) 9

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) 2

Summers v. Earth Island Institute, 555 U.S. 488 (2009) 1, 7

Thompson v. N. Am. Stainless, LP, 131 S. Ct. 863 (2011) 6, 15

United Pub. Workers of Am. v. Mitchell, 330 U.S. 75 (1947) 4

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 4

United States v. Morrison, 529 U.S. 598 (2000) 2, 7-8

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 4

Vignaroli v. Blue Cross of Iowa, 360 N.W.2d 741 (Iowa 1985) 11

Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) 17

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) 10

Warth v. Seldin, 422 U.S. 490 (1975) 6, 9

Weiner v. Bank of King of Prussia, 358 F. Supp. 684 (E.D. Pa. 1973) 10

TABLE OF AUTHORITIES—Continued

Page

West v. Prudential Sec., Inc.,
282 F.3d 935 (7th Cir. 2002) 16-17

Whitmore ex rel. Simmons v. Arkansas,
495 U.S. 149 (1990) 5

Youngman v. Tahmoush,
457 A.2d 376 (Del. Ch. 1983) 13

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) .. 2

Constitutions

U.S. Const. art. II, § 3, cl. 4 2

U.S. Const. art. III ..... passim

Rule

Sup. Ct. R. 37 1

Miscellaneous

Adler, Jonathan H., *Standing Still in the Roberts Court*, 59 Case W. Res. 1061 (2009) 8

Bressman, Lisa Schultz, *Judicial Review of Agency Inaction: An Arbitrariness Approach*,
79 N.Y.U. L. Rev. 1657 (2004) 2

Chemerinsky, Erwin, *Constitutional Law: Principles and Policies* (2d ed. 2002) 4

Coffee, John C., Jr., *Rethinking the Class Action: A Policy Primer on Reform*,
62 Ind. L.J. 625 (1987) 13

TABLE OF AUTHORITIES—Continued

Page

Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives, 113 Harv. L. Rev. 1806 (2000) 14

Elliott, Heather, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159 (2011) 7

Elliott, Heather, *The Functions of Standing*, 61 Stan. L. Rev. 459 (2008) 3

Epstein, Richard A., *Standing and Spending—The Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1 (2001) 5

Gaston, Jeremy, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215 (1998) 3, 9, 12-14

Hill, Samuel M., *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147 (1995) 14-15

Mullenix, Linda S., *Dueling Class Actions*, Nat'l L.J. (Apr. 26, 1999) 16

Nagareda, Richard A., *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149 (2003) 12, 17

TABLE OF AUTHORITIES—Continued

Page

Partridge, Scott S., & Miller,Kerry J., *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125 (2000) 16

Posner, Richard A., *The Problematics of Moral and Legal Theory* (1999) 3

Post, Robert C. & Siegel, Reva B., *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003) 8

Redish, Martin H., *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71 17

Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983) 3

Skitol, Robert A., *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239 (1999) 17

Sunstein, Cass R., *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163 (1992) 3

Taylor, Robert P., *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 Antitrust L.J. 515 (1986) 3

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Center for Constitutional Jurisprudence respectfully submit this brief amicus curiae in support of First American Financial Corporation.[1]

Pacific Legal Foundation (PLF) was founded over thirty-five years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, as well as the consequences of permitting noninjury class actions. *See, e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest law arm of the Claremont Institute, the mission of which is dedicated to upholding the principles of the American Founding

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

to their rightful and preeminent authority in our national life, including the proposition that liberty is best protected by adherence to separation of powers and recognition on the limits of the grant of power to each branch of government. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); and *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 1807 (2011).

ARGUMENT

I

CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST

The text of Article III gives the federal courts authority to hear only "Cases" and "Controversies" and serves to maintain the constitutional balance between the branches. Indeed, this Court has stated that standing "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Specifically, courts do not impinge upon the Executive's duties to "take Care that the Laws be faithfully executed" under Article II. U.S. Const. art. II, § 3, cl. 4 (Take Care Clause). Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An*

Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657, 1684 (2004); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

The "Take Care" Clause reflects a structure that does not permit Congress to use citizen suits and other private enforcement actions to conscript the courts in its battles with the Executive, which would result in an imbalance among the branches. Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 492-500 (2008). Suits against private entities for violations of the law particularly raise "a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power." Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 231 n.300 (1992).

The constitutional structure also reflects the fact that courts—lacking independent fact-finding ability—are well equipped to handle actual disputes between adverse parties, but are poorly equipped to handle theoretical disputes. *See* Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 Antitrust L.J. 515, 518 (1986) (noting that "the judicial process is poorly equipped to deal . . . with highly speculative claims of injury"). Put simply, "courts should not make unnecessary decisions, because unnecessary decisions are often bad decisions." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215, 221 (1998). Rather, courts, "at their best," are "councils of wise elders meditating on real disputes." Richard A. Posner, *The Problematics of Moral and Legal Theory*

257-58 (1999). The standing requirement assures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Deciding cases in "an actual factual setting" ensures that a court's decisions "will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.*

Requiring an actual, concrete injury for a private plaintiff to have standing to sue serves both prudential and constitutional policies. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 50-51 (2d ed. 2002) (describing policies of conserving judicial resources, optimizing judicial decisionmaking, and promoting fairness as underlying the justiciability doctrines, including standing). This Court has emphasized that parties who have suffered an actual injury-in-fact test present concrete issues more amenable to concrete resolution. *See United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying " 'concrete legal issues, . . . not abstractions'" as requisite for constitutional litigation and expressing concern regarding the lack of specific facts about which of plaintiff's activities the challenged Hatch Act prohibited (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940))); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (describing a "justiciable controversy" as a controversy satisfying requirement for a concrete dispute touching a legal relationship between parties).

These constitutional and prudential concerns were at the forefront of the analysis in *Lujan*, 504 U.S. 555, which outlined the essence of current standing doctrine. To have standing, a plaintiff must claim to have suffered an injury-in-fact that was caused by the defendant, which is redressable by some court action. *Id.* at 560-61. The injury must be "concrete and particularized,"[2] *id.*, and " 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (quoting *Whitmore ex rel. Simmons v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citations omitted))). For causation, the injury must be "'fairly . . . trace[able] to the challenged action of the defendant.'" *Id.* at 560 (brackets in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). In terms of redressability, the requested relief must be reasonably capable of redressing the injury rather than "speculative." *Id.* at 561 (quoting *Simon*, 426 U.S. at 43).

Congress can, by statute, require the federal courts to abandon *prudential* standing requirements. *See, e.g., Bennett*, 520 U.S. at 163-64 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."). And Congress may create rights, the

---

[2] Amicus Center for Constitutional Jurisprudence has previously urged this Court to lower the "particularized" threshold, but the dispute over whether the "particularized" element is merely a prudential concern or is of constitutional magnitude is not at issue in this case, which instead turns on whether the injury is "concrete" and "actual." *See, e.g.*, Center for Const. Jur. Am. Brf. Supporting Petition for Writ of Certiorari, *Schaffer v. O'Neil*, 534 U.S. 992 (2001) (certiorari denied); Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles*, 4 Chap. L. Rev. 1 (2001).

deprivation of which gives rise to a cognizable Article III injury. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). However, these lines of cases do not alter Article III's outside limit on Congress's authority to grant standing. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (While Congress could eliminate prudential barriers to expand standing to sue under the Fair Housing Act to the full extent permitted by Article III, "in no event . . . may Congress abrogate the Article III minima.") (citing *Warth*, 422 U.S. at 501, and *Simon*, 426 U.S. at 38). *Cf. Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011) (declining to interpret Title VII's grant of a private cause of action to any "aggrieved person" as conferring standing coextensive with Article III where such an expansive grant of standing would lead to "absurd consequences").

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576. That is, a plaintiff's claim that a defendant failed to follow the law—without more—is insufficient to satisfy Article III. *See also Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) ("[J]udicial review is effective largely because it is not available simply at the behest of a partisan faction, but is

exercised only to remedy a particular, concrete injury.").

This point was further firmly established as part of constitutional standing doctrine in *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), holding that "it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *See also Summers*, 555 U.S. 488 (rejecting environmentalist groups' efforts to challenge revised procedures the U.S. Forest Service adopted to streamline timber removal on small parcels affected by forest fires, holding that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute").

Harmonizing the approaches of both the statutory and constitutional cases, Professor Heather Elliott concludes, "Congress can only identify injuries that the Court would agree are concrete and can only elevate to de jure status injuries that the Court would already recognize as de facto." Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 187 (2011). She explains two inter-related reasons for this limitation on Congress. First, it is unclear whether a statute that "deems" a person to have standing is *factual* finding of the sort typically granted deference by the courts. Second, even if a pronouncement of standing is considered to be a factual one, fact-finding is given only limited deference when it comes to matters implicating constitutional structure. Thus, in *United States v. Morrison*, 529 U.S. 598, 614 (2000), for example, this Court rejected congressional fact-finding that sought to demonstrate that gender violence had a nontrivial effect on

interstate commerce: "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id.* (alterations, citations, and internal quotation marks omitted). *See also Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

Because "it is the Court's special responsibility to mark where Congress has exceeded its constitutional bounds," Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003), to the extent Congress can confer standing on a plaintiff, it is limited to "tinker[ing] at the edges," of prudential standing. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case W. Res. 1061, 1063 (2009); *Bennett*, 520 U.S. at 163 (finding plaintiffs had standing under "zone of interests" prudential standing doctrine due to congressional authorization of suit by "any person"). A statute may not "confer" Article III standing on a private person to sue a private defendant for regulatory errors that caused no injury beyond violation of the statute or regulation itself.

II

PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION

A. "Representative" Plaintiffs must Have Suffered the Same Injury as the Class They Seek To Represent

The standing issue presented in this case gains extra importance because the named plaintiff seeks to represent a class. The class action overlay adds complex procedural and policy concerns that impact not only the named parties, but all nonparties similarly situated who would be bound by the case resolution. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23."). In short, class actions are "a special kind of litigation," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), in which the standing of the named plaintiff assumes even greater importance.

Adjudicating the rights of third parties in their absence without some compelling need is unfair, both to present and future litigants. *See, e.g., Warth*, 422 U.S. at 509-10 (denying third party standing when no special relationship existed between the litigants and the third parties and a denial of standing would not harm the third parties).; Gaston, 77 Tex. L. Rev. at 258 ("Standing is about letting the presently affected litigate their adversarial claims, not about binding the countless and unaware to the decisions of lawyers who have only their self-interest at stake."). Thus, class representatives must actually be members of the class.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (To satisfy standing, the class representative must suffer an injury and must have the "same interest" and the "same injury" as the class members.); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1969) (rejecting a class claim, holding that plaintiffs "cannot represent a class of whom they are not a part").

The representative plaintiffs cannot use the procedural requirements of Federal Rule of Civil Procedure 23 to create standing if it otherwise does not exist. *See Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.") (Burger, C.J., concurring in the result in part and dissenting in part). *See also Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690, 694-95 (E.D. Pa. 1973) ("[A] procedural rule cannot supply a substantive element" and thereby confer standing upon the plaintiff.). This has not been a controversial principle; both federal and state courts (relying on federal law as persuasive authority) have long demanded standing from lead plaintiffs in class actions. *See Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 (2005) (plaintiff who cannot state an individual claim for lack

of injury has no standing to represent a class of potentially injured plaintiffs); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-78 (Tex. 2001) (without actual injury, plaintiff had no standing to bring class action); *Landesman v. General Motors Corp.*, 377 N.E.2d 813, 815 (Ill. 1978) (Where the plaintiff has no individual cause of action, it necessarily follows that any attempted class action must also fail); *Kid's Care, Inc. v. Alabama Dep't of Human Resources*, 843 So. 2d 164, 167 (Ala. 2002) (If named plaintiff has not been injured by wrong alleged in complaint, then no case or controversy is presented and plaintiff has no standing to sue either on his own behalf or on behalf of a class); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 450 (Ohio 1998) (to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent); *Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 857-58 (Mo. 1997) (Named plaintiffs who represent class must allege and show that they personally have been injured, not that injury has been suffered by other members of class which they purportedly represent); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985) (While class membership is not expressly required by the Iowa class actions rule, it is implicit in that rule that class representative be class member); *Doe v. Governor*, 412 N.E.2d 325, 327 (Mass. 1980) (If the individual plaintiffs may not maintain the action on their own behalf, they may not seek relief on behalf of class).

This Court should not abandon a strong standing requirement and replace it with an open-ended theory

permitting people who are not harmed and who do not claim to be harmed to sue in the name of those who may (or may not) be able to allege such harm. Such a system ignores the plain language of Rule 23, risks damaging individuals who could claim actual injuries, and will clog the courts with lawsuits that seek to redistribute wealth from businesses and actually-injured parties to "bounty-hunting" plaintiffs' lawyers.

B. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom they purport to represent. Even the "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a "representative" who is not a member of the class is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who

happens to have the least information." Gaston, 77 Tex. L. Rev. at 244. Because the class action binds these absent and informationally impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *Id.*

Other courts agree, holding that an adequate representative is one who is "qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution." *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). Essentially, this requires that the representative's stake in the case, whatever that may be, rises or falls on the claims of the other class members. Commonality among plaintiff class members is important because individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See, e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Moreover, the aggregation of claims detracts from the

acknowledgment of each plaintiff's particular injuries, a value some courts and commentators recognize as a legitimate end in itself, apart from the end of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812-13 (2000); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Denying representative status to uninjured, nonclass members is the only way to protect the interests of the class members. "Foremost, they do not get 'sold down the river' by having their future claims devalued and decided before they even accrue." Gaston, 77 Tex L. Rev. at 237. For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." *Id.* at 238.

Lawsuits holding the potential only for a small recovery for each class member, such as this one, are particularly susceptible to abuse:

> The plaintiffs' potential recoveries in a small claimant case are, by definition, minimal. Even if the case succeeds, the plaintiff and class members will receive a minute sum. By contrast, the plaintiffs' attorneys, whose fee is determined by reference to the aggregate amount of the recovery, stand to gain immense financial rewards. Consequently, plaintiffs have little incentive to participate in or monitor the litigation. For all practical purposes, plaintiff's lawyers are the real parties in

> interest who initiate, finance, and control the litigation. *See, e.g., Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.).

Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 148 (1995).

Permitting claimants who lack standing to represent a class of claimants who may (or may not) have standing will open the floodgates to "lawyer's lawsuits" and clog the courts with dozens of similar claims. The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For "[i]f passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984).

These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up

> elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18). "Noninjury" standing, combined with the class action procedure, would result in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Gen. Motors Corp.*, 55 F.3d at 784-85, 789.

The "blackmail" charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. In fact, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers*, 437 U.S. at 476. *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under

"hydraulic pressure" to settle).[3] "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Nagareda,, 103 Colum. L. Rev. at 151.

With little to gain from representing the interests of the class, such litigation will be used not to redress injury but as a sham to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Injured parties "neither make the decision to sue . . . nor receive meaningful compensation." *Id.* Rather, the prospect of significant

---

[3] This pressure to settle was a key factor for courts denying certification in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *West*, 282 F.3d at 937 (Easterbrook, J.); *Parker v. Time Warner Entertainment Co.*, 331 F.3d at 26 (Newman, J., concurring); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting); *Castano*, 84 F.3d at 746; *Gen. Motors Corp.*, 55 F.3d at 784-85, 789; *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 305 (S.D. Tex. 2000); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998); *Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 820 n.6 (Ala. 2000) (Hooper, C.J., dissenting); *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 720-21, 752 A.2d 200, 217 (2000).

attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.* Thus, noninjury class actions to recover compensation simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id.* This would be a gross misuse of the justice system, and this Court should reject it.

CONCLUSION

The requirement that a litigant have standing recognizes that courts are not super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact. Article III requires an actual injury in fact to maintain standing. "No harm" lawsuits—particularly "no harm" class actions, as in this case—are a drain on both economic and judicial resources, to no one's benefit except the plaintiffs' bar.

The judgment of the Ninth Circuit Court of Appeals should be reversed.

DATED: August, 2011.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-mail:
jeastman@chapman.edu
caso@chapman.edu

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and the Center for Constitutional Jurisprudence

AMICUS CURIAE BRIEF

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO THE
FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PUBLIC LAW PROFESSORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

Counsel for Amici Curiae

Dated: October 17, 2011

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. CONGRESS HAS THE AUTHORITY TO CREATE JUDICIALLY ENFORCEABLE SUBSTANTIVE RIGHTS TO CARRY OUT THE PURPOSES OF CONSUMER PROTECTION SCHEMES. 8

A. RESPA Falls Well Within Congress' Constitutional Power. 8

B. Petitioners' Contrary Arguments Are Wrong. 15

1. Petitioners' Emphasis on Private Rights of Action Is Misplaced. 15

2. Petitioners' Argument Would Impermissibly Restrict Congressional Authority. 17

II. RESPONDENT'S STANDING IS DEMONSTRATED BY THE FACT THAT SHE IS ASSERTING AN INDIVIDUAL RIGHT VIOLATED BY CONDUCT DIRECTED PERSONALLY AT HER. 20

III. RESPONDENT'S INJURY IS OF A TYPE TRADITIONALLY RECOGNIZED AS A LEGALLY COGNIZABLE HARM. 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES:

Alexander v. Sandoval,
532 U.S. 275 (2001) 15

Allen v. Wright,
468 U.S. 737 (1984) 8, 22, 23

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) 7, 13, 21

Arizona Christian School Tuition
Organization v. Winn,
-- U.S. --, 131 S.Ct. 1436 (2011) 21

ASARCO Inc. v. Kadish,
490 U.S. 605 (1989) 18

Ass'n of Data Processing Serv. Org'ns v. Camp,
397 U.S. 150 (1970) 24

Bartnicki v. Vopper,
532 U.S. 514 (2001) 12

Beaudry v. TeleCheck Servs., Inc.,
579 F.3d 702 (6th Cir. 2009) 11

Carter v. Welles-Bowen Realty, Inc.,
553 F.3d 979 (6th Cir. 2009) 7, 13, 20

Chicago Junction Case,
264 U.S. 258 (1924) 22

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 21

Fed. Election Comm'n v. Akins,
524 U.S. 11 (1998) 9, 10, 24

Flast v. Cohen,
392 U.S. 83 (1968) 23

Gladstone Realtors v. Vill. of Bellwood,
441 U.S. 91 (1979) 13-14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 9, 10, 11

Hein v. Freedom from Religion Found.,
551 U.S. 587 (2007) 23

Holder v. Humanitarian Law Project,
— U.S. —, 130 S.Ct. 2705 (2010) 11-12

Linda R.S. v. Richard D.,
410 U.S. 614 (1973) 9, 17, 18

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 14, 16, 19, 22, 23

Marbury v. Madison,
1 Cranch 137 (1803) 21

Massachusetts v. Envtl. Prot. Agency,
549 U.S. 497 (2007) 9, 14, 19, 24

Michoud v. Girod,
45 U.S. 503 (1846) 26

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 12

Public Citizen v. Dep't of Justice,
491 U.S. 440 (1989) 10, 24

Raines v. Byrd,
521 U.S. 811 (1997) 16

Schlesinger v. Reservists Committee to Stop
the War, 418 U.S. 208 (1974) 18, 22, 24

Sierra Club v. Morton,
405 U.S. 727 (1972) 9, 17, 24

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 16

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 21

Turner Broad. Sys. v. Fed. Communications
Comm'n, 512 U.S. 622 (1994) 11, 12

Turner Broad. Sys., Inc. v. Fed. Communications
Comm'n, 520 U.S. 180 (1997) 12

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 21

United States v. Carter,
217 U.S. 286 (1910) 26

United States v. Hays,
515 U.S. 737 (1995) 24

United States v. Richardson,
418 U.S. 166 (1974) 24

Valley Forge Christian Coll. v. Am. United for Separation of Church & State,
454 U.S. 464 (1982) 15, 16, 23

Vt. Agency of Nat. Res. v. United States,
529 U.S. 765 (2000) 9, 16, 17

Warth v. Seldin,
422 U.S. 490 (1975) ..... *passim*

Wilson v. Garcia,
471 U.S. 261 (1985) 15

STATUTES AND RULES:

12 U.S.C. § 2601(b)(2) 5, 13, 14
12 U.S.C. § 2607 6
12 U.S.C. § 2607(a) 5, 9, 14, 17
12 U.S.C. § 2607(b) 5
12 U.S.C. § 2607(c)(4) 5
12 U.S.C. § 2607(d)(2) 5, 14
12 U.S.C. §§ 2601-2617 4
15 U.S.C. § 1640 3
15 U.S.C. § 1640(a) 3
15 U.S.C. § 1681n 3
15 U.S.C. § 1681n(a) 4
15 U.S.C. § 1692k 3
15 U.S.C. §§ 1601-1667f 3
15 U.S.C. §§ 1681-1681x 3
15 U.S.C. §§ 1692-1692p 3
16 U.S.C. § 1540(g) 16

31 U.S.C. § 3729(a) 16
42 U.S.C. § 3604(d) 10
5 U.S.C. § 702 16

Supreme Court Rule 37.6 1

Federal Rule of Civil Procedure 23(f) 7

H.R. Rep. No. 93-1177 (1974) 4

Pub. L. No. 104-130, § 3, 110 Stat. 1200 (1996) 16

S. Rep. No. 93-866, 1974 U.S.C.C.A.N. 6546 ..... 4, 13

OTHER AUTHORITIES:

George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* (2d rev. ed. 1993) 26-27

Dep't of Housing & Urban Dev. & Veterans' Admin., *Mortgage Settlement Costs* (Mar. 1972) 4

Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies-and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633 (2006) 21

F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights* , 93 Cornell L. Rev. 275 (2008) 22

Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs, 92d Cong. (Mar. 1-3, 1972) 4

Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency, 92d Cong. (Feb. 22-24, 1972) 4

Restatement (Second) of Agency § 469 13

Restatement (Third) of Agency § 8.01 26

Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 Case W. Res. L. Rev. 1023 (2009) 14

Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689 (2004) 21, 22

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici are public law professors who teach and write in the areas of constitutional and administrative law and take a professional interest in the development of this Court's justiciability jurisprudence.[1]

Amici have an important interest in this case because they are concerned that the position advanced by Petitioners misconstrues this Court's precedent and would violate the separation of powers by unduly restricting Congress' authority to confer judicially enforceable rights by federal statute. The law involved here – the Real Estate Settlement Procedures Act – prohibits real estate professionals and settlement services from making or accepting kickbacks in connection with real estate settlement transactions. The law is a textbook illustration of Congress' power to create new statutory rights to protect consumers. There is nothing constitutionally problematic or remarkable about allowing homebuyers who have been the victims of unfair business practices by real estate professionals to sue to protect their statutory rights. Petitioners' contrary position would undermine a wide range of consumer protection measures and impermissibly limits congressional power to provide

---

[1] The parties have filed blanket consents to the filing of *amici curiae* briefs. In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

for federal judicial enforcement of individual rights conferred by federal statute. More information about the specific interest of each law professor is provided below.

Todd Aagaard is an Associate Professor at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

Eric Biber is an Assistant Professor of Law at the University of California, Berkeley. He teaches and writes in the fields of environmental law and administrative law.

Erwin Chemerinsky is the founding dean and distinguished professor of law at the University of California, Irvine School of Law, with a joint appointment in Political Science. His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation.

Daniel Farber is the Sho Sato Professor of Law and chair of the Energy and Resources Group at the University of California, Berkeley. He is also the Faculty Director of the Center for Law, Energy, and the Environment. Professor Farber is a member of the American Academy of Arts and Sciences and of the American Law Institute. He teaches and writes in a variety of areas, including environmental law and constitutional law.

Amanda Cohen Leiter is an Associate Professor of Law at American University's Washington College of Law. Her teaching and research interests include torts, administrative law and process, environmental law and policy, and Supreme Court practice.

Michael Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches and writes in civil procedure, federal courts, conflicts of laws, and complex litigation.

Amy Wildermuth is a Professor of Law at the University of Utah's S.J. Quinney College of Law. She teaches and writes in the areas of civil procedure, administrative law, environmental law, property, and Supreme Court practice.

STATEMENT

1. Congress has enacted numerous statutes to protect consumers from unscrupulous business practices. See, *e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (regulating creditor disclosures); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (regulating consumer credit reporting agencies); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (regulating debt collectors). Many of these statutes contain private rights of action, by which individuals victimized by prohibited business practices may seek redress from the violator. See, *e.g.*, 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1681n (Fair Credit Reporting Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act). Federal consumer protection statutes often provide that victimized consumers may recover an amount based on what they were charged for the unlawful service or an amount specified in the statute. See, *e.g.*, 15 U.S.C. § 1640(a) (violator is liable to victim "in an amount equal to the sum of . . . any actual damage sustained by such person as a result of the failure [and] twice the amount of any finance charge

in connection with the transaction"); 15 U.S.C. § 1681n(a) (violator who obtains a consumer report under false pretenses or knowingly without a permissible purpose is liable to victim in an amount equal to "actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater").

As part of this pattern of consumer protection measures, Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601-2617, to protect consumers in the market for real estate settlement services. The legislative history of RESPA, including committee reports, hearings, and a report commissioned from the Department of Housing and Urban Development and the Veterans' Administration, documents rampant schemes by which brokers, escrow agents, sellers, and settlement attorneys were paid fees for referring business to settlement service providers, undermining competition for settlement services and harming consumers. S. Rep. No. 93-866, at 6, *reprinted in* 1974 U.S.C.C.A.N. 6546; H.R. Rep. No. 93-1177, at 7 (1974); *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 92d Cong., at 3, 8, 21-22, 53 (Feb. 22-24, 1972) ("*1972 House Hearings*"); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong., at 14 (Mar. 1-3, 1972); Dep't of Housing & Urban Dev. & Veterans' Admin., *Mortgage Settlement Costs* (Mar. 1972), *reprinted in 1972 House Hearings*, *supra*, at 735-872.

RESPA's stated purposes accordingly include "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). To effectuate this purpose, RESPA § 8 gives consumers a substantive right to a real estate settlement free from kickbacks or fees for referrals; RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). RESPA § 8 also provides that no portion of the charge for any covered settlement service may go to any person "other than for services actually performed." 12 U.S.C. § 2607(b).[2] Finally, § 8 creates a private right of action for victims of violations of these anti-kickback provisions and holds violators "liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2).

2. This case alleges that Petitioner First American Financial Corporation ("First American") violated RESPA's anti-kickback provisions by paying a real estate settlement firm, Tower City Title Agency ("Tower City") of Cleveland, Ohio, for referrals of title insurance services to First

---

[2] RESPA establishes limited exceptions to those prohibitions, including allowing certain "affiliated business arrangements" under specified conditions, such as advance disclosure to the consumer. 12 U.S.C. § 2607(c)(4).

American. Petitioner First American Financial Corporation owns, among other holdings, Petitioner First American Title Insurance Company ("First American Title"), which issues title insurance policies nationwide. Pet. App. 50a. In 1998, First American Title entered into an agreement with Tower City in which Tower City agreed to refer title insurance underwriting to First American Title. Pet. App. 51a. In exchange for the referrals, First American Title purchased a minority interest in Tower City. Pet. App. 51a-52a.

Respondent Denise P. Edwards purchased a home in Cleveland, Ohio, in September 2006. Pet. App. 50a. Tower City acted as the settlement agent in the transaction. Pet. App. 51a. Pursuant to its prior arrangement with First American Title, Tower City referred the title insurance to First American Title, which issued a policy to Respondent.

Respondent filed a class action complaint in district court against First American and First American Title, alleging that they violated RESPA § 8, 12 U.S.C. § 2607, by paying individual title companies such as Tower City in exchange for exclusive referral agreements with First American Title. Pet. App. 48a-60a. Petitioners moved to dismiss for lack of subject matter jurisdiction, arguing that Respondent lacked standing to bring her RESPA claim. Pet. App. 13a. The district court denied Petitioners' motion, holding that RESPA gave Respondent "a right to be free from referral-tainted settlement services," the violation of which constituted an injury that established Respondent's standing. Pet. App. 19a.

On appeal,[3] the Ninth Circuit affirmed the district court's holding that Respondent had standing to bring her RESPA claim. Pet. App. 1a-7a. The court of appeals rejected Petitioners' argument that a RESPA plaintiff must allege an overcharge in order to establish standing to sue for violations of RESPA's anti-kickback provisions. The Ninth Circuit noted that the legislative history of RESPA includes findings that violations of RESPA's anti-kickback provision "could result in harm beyond an increase in the cost of settlement services." Pet. App. 4a-7a (citing H.R. Rep. No. 97-532, at 52 (1982)). Accord *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009).

SUMMARY OF ARGUMENT

Respondent has standing to vindicate her statutory right to real estate settlement services untainted by kickbacks. Three key characteristics of Respondent's injury highlight the strength of her standing arguments. First, Respondent is asserting the violation of an individual substantive right explicitly created by Congress in a statute. Second,

---

[3] Respondent had moved in the district court for certification of a class of purchasers of First American title insurance, Pet. App. 24a-25a, and a class of customers of Title City, Pet. App. 32a. The district court denied both motions for class certification. Pet. App. 29a, 40a. Respondent appealed the district court's denial of class certification to the Ninth Circuit pursuant to Federal Rule of Civil Procedure 23(f). J.A. 9-10. In an opinion separate from its decision affirming Respondent's standing, the Ninth Circuit reversed the district court's order denying certification of the Tower City class. Pet. App. 8a-11a.

Respondent is asserting an individual right violated by conduct of the Petitioners directed personally at her. Third, the type of injury Respondent suffered as a result of Petitioners' conduct traditionally has been recognized as a legally cognizable harm.

Although constitutional standing doctrine "incorporates concepts concededly not susceptible of precise definition," *Allen v. Wright*, 468 U.S. 737, 751 (1984), and marginal standing cases often divide this Court, there is a core of cases in which standing is clear. This case fits squarely within that core. Petitioners' arguments, on the other hand, would require a significant retreat from this Court's well-established standing precedent and would call into question private rights under a wide range of federal consumer protection statutes.

ARGUMENT

I. CONGRESS HAS THE AUTHORITY TO CREATE JUDICIALLY ENFORCEABLE SUBSTANTIVE RIGHTS TO CARRY OUT THE PURPOSES OF CONSUMER PROTECTION SCHEMES.

A. RESPA Falls Well Within Congress' Constitutional Power.

Congress explicitly authorized private suits against violations of RESPA's anti-kickback provision by giving consumers of real estate settlement services a substantive statutory right to services untainted by kickbacks, by identifying the consumer's personal interest in protection of that substantive right, and by creating a private cause of action to seek redress for the harm caused by

violations of the statutory right. 12 U.S.C. § 2607(a), (d). These facts are "of critical importance to the standing inquiry." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 516 (2007); see also *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998) (finding standing on the ground that "there is a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered").

In creating private rights to enforce RESPA, Congress acted well within its constitutional authority. It has long been settled that Congress may "define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 773 (2000); see also, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (Congress may "broaden[] the categories of injury that may be alleged in support of standing").

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), aptly illustrates the principle. *Havens* involved alleged violations of Section 804(d) of the Fair Housing Act, which makes it unlawful "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when

such dwelling is in fact so available." 42 U.S.C. § 3604(d). The plaintiffs in *Havens* were "testers"—"individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373. The defendant real estate company argued the plaintiffs lacked standing because they approached the defendant expecting to receive false information and without intention to buy or rent a home, and therefore had not been harmed by the defendant's misrepresentations. *Id.* at 374. The Court rejected this argument on the basis that the statute created an "enforceable right to truthful information" and that plaintiffs had been harmed by virtue of their deprivation of that statutory right, thereby satisfying Art. III's injury requirement. *Id.* at 373-74; *see also Akins*, 524 U.S. at 21 ("[T]his Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.") (citing *Havens*); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").[4]

---

[4] Petitioners attempt to reconstitute *Havens* by limiting it to situations involving "incorrect information on the basis of race." Pet. Br. 31. *Havens*, however, focused explicitly on the principle that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." 455 U.S. at 373 (internal quotation marks omitted, alteration in *Havens*). Nothing in *Havens*' reasoning indicates that its result rested on

RESPA creates an enforceable right to receive real estate settlement services untainted by a kickback, just as the Fair Housing Act at issue in *Havens* creates an enforceable right to truthful information regarding the availability of housing (without any further proof regarding the use to which the consumer would put that information). The deprivation of that statutory right is itself an injury, regardless whether the consumer suffers additional consequential damages. Cf. *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (Sutton, J.) (holding that the Fair Credit Reporting Act similarly "does not require a consumer to wait for . . . consequential harm before enforcing her statutory rights").

To require a RESPA plaintiff to show consequential damages to establish her standing would be the equivalent of requiring a Fair Housing Act plaintiff to allege a harm beyond the violation of his statutory rights, a position that *Havens* explicitly rejected. Just as additional harm was not constitutionally required in *Havens*, so it cannot be constitutionally required under RESPA, either.

Congress' authority to define injuries that will establish standing finds additional support in well-established general principles of judicial deference to legislative judgments. This Court has held that "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 665 (1994) (*Turner I*) (plurality); see also *Holder v. Humanitarian Law Project*, --- U.S. —, 130 S.Ct.

---

the fact that the statutory right at issue involved information or racial discrimination in particular.

2705, 2728 (2010); *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001). This deference is due in part because Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Turner I*, 512 U.S. at 665-66 (plurality opinion) (quoting *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985)). "[A]n additional measure of deference [arises] out of respect for [Congress'] authority to exercise the legislative power." *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 520 U.S. 180, 196 (1997) (*Turner II*). In sum, "deference must be accorded to [Congress'] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Id.*[5]

The judgments made by Congress in enacting RESPA are therefore entitled to deference. Those judgments amply support Respondent's standing to pursue her RESPA claim. Specifically, Congress found that kickbacks in real estate transactions harm consumers and that this harm justifies prohibiting all such kickbacks, regardless of an individual consumer's ability to establish an overcharge, a burdensome inquiry that may often be difficult and expensive for an individual consumer to conduct, particularly given the relatively small financial stake typically at issue. RESPA includes an explicit finding that kickbacks and referral fees "tend to increase unnecessarily the costs of certain

---

[5] On the other hand, even deference will not validate an implausible congressional judgment. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 378 (2000).

settlement services." 12 U.S.C. § 2601(b)(2). Congress could have decided to regulate settlement costs directly, but instead intentionally and rationally chose "to regulate the underlying business relationships and procedures of which the costs are a function." S. Rep. No. 93-866, at 3, 1974 U.S.C.C.A.N. at 6548. Congress also decided not to require individual RESPA plaintiffs to prove harm beyond the violation of their statutory right to services free of kickbacks. See Pet. App. 5a; *Alston*, 585 F.3d at 759; *Carter*, 553 F.3d at 989.[6] Congress' chosen approach is consistent with the nature of the systemic, anti-competitive effects of kickbacks, which can become significant in the aggregate even if they are small and difficult to prove individually. That approach is also consistent with common law restitution principles that do not require proof of harm beyond unjust enrichment of the defendant at the hands of the plaintiff, see, *e.g.*, *Restatement (Second) of Agency* § 469 (providing that an unfaithful agent "is not entitled to compensation even for properly performed services").

These principles of deference hardly provide a blank check to the legislature. This Court has explained that, although deference is owed to Congress, its power to define the interests that will support standing is not absolute. In particular, Congress may not "abrogate the Art. III minima." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91,

---

[6] The petition for certiorari in this case challenged the court of appeals' interpretation of RESPA as not requiring an allegation of an overcharge, but this Court limited certiorari to the constitutional standing question. The case thus comes before this Court on the presumption that RESPA does not require an allegation of an overcharge.

100 (1979). "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'" *Massachusetts*, 549 U.S. 497, 516 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in judgment)); see also Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 Case W. Res. L. Rev. 1023, 1054-55 (2009) (arguing that "federal courts should give some level of deference to Congress statutorily addressing the standing of potential plaintiffs" and that deference "does not mean judicial abdication").

RESPA easily satisfies these criteria. In enacting RESPA, Congress explicitly found kickbacks and referral fees paid in conjunction with referrals of real estate settlement services harm consumers of such services. 12 U.S.C. § 2601(b)(2). Consequently, Congress gave consumers the statutory right to real estate settlement services free of kickbacks or referral fees. 12 U.S.C. § 2607(a); see also 12 U.S.C. § 2607(d)(2) (granting a private right of action by which "the person or persons charged for the settlement service" may sue "[a]ny person or persons who violate the prohibitions or limitations of this section"). Congress did not extend that right to every citizen, or even to every potential buyer in the housing market, but only to consumers who actually incur the costs of settlement services. A violation of the right to impartial and unbiased referrals—and, in turn, a cognizable injury—exists as soon as the consumer pays for kickback-tainted real estate settlement services, whether or not the consumer can prove she paid a higher price or received a lower quality of service.

B. Petitioners' Contrary Arguments Are Wrong.

Contrary to these well-settled principles, Petitioners take the position that, because Art. III's standing requirements are constitutionally derived, Congress's creation of a statutory right has no bearing on whether deprivation of the right causes an injury that establishes standing. Petitioners offer two primary arguments in support of this theory, neither of which is availing.

1. Petitioners' Emphasis on Private Rights of Action Is Misplaced.

First, Petitioners argue that the existence of a statutory private right of action does not itself suffice to establish an injury for standing purposes. Pet. Br. 20-21. That point is indeed well settled, but it has no bearing on the question presented here, for Respondent has pointed to the violation of a substantive statutory right under RESPA, not merely to the existence of a private right of action. Cf. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (distinguishing Congress's creation of a private right from creation of a private cause of action); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 487 n.24 (1982) (noting that the APA's judicial review provision does not create a substantive legal right); *Wilson v. Garcia*, 471 U.S. 261, 278 (1985) (noting that 42 U.S.C. § 1983 "only provides a remedy and does not itself create any substantive rights"). It is the statutorily created substantive right to participate in real estate settlement transactions untainted by

kickbacks, not RESPA's corollary right of action, that establishes Respondent's standing, because only a substantive right can form the basis for an injury in fact.

The cases Petitioners cite all involve statutory private rights of action without an alleged deprivation of an individual substantive statutory right.[7] Since none of those cases involved a statute that created an individual substantive right, they in no way countermand the long line of cases teaching that violation of a congressionally created, individual, substantive statutory right constitutes an

---

[7] The Line Item Veto Act at issue in *Raines v. Byrd*, 521 U.S. 811 (1997), for example, created a private right of action to challenge the constitutionality of the Act, see Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996), but created no individual substantive rights. Similarly, the plaintiff in *Valley Forge Christian College*, *supra*, sued under the Administrative Procedure Act's judicial review provision, 5 U.S.C. § 702, which this Court noted creates no substantive legal rights and therefore had no bearing on the standing of the plaintiffs. 454 U.S. at 487 n.24. *Lujan*, *supra*, was a suit brought under the Endangered Species Act's citizen suit provision, 16 U.S.C. § 1540(g); this Court held that neither that provision nor the substantive provisions of the Act the defendants had allegedly violated created any " 'individual rights' " and on that basis found no standing. 504 U.S. at 577-78 (quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)). Finally, the plaintiff in *Vermont Agency of Natural Resources*, *supra*, sued pursuant to the False Claims Act, which creates a qui tam right of action, 31 U.S.C. § 3729(a), but gives the plaintiff no "legally protected right." 529 U.S. at 772-73. Petitioners mistakenly also assert that *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105 (1998), "held that the respondent lacked injury in fact" despite the existence of a private right of action. Pet. Br. 20. In fact, *Steel Co.* expressly "assum[ed] injury in fact," but found that the plaintiffs' complaint "fail[ed] the third prong of standing, redressability." 523 U.S. at 105.

injury in fact. In this case, by contrast, there is no question that RESPA, in addition to creating a private right to sue, creates an individual substantive statutory right to real estate settlement services free of kickbacks. 12 U.S.C. § 2607(a). It is Petitioners' invasion of this right that, under this Court's precedents, creates an injury in fact that establishes standing.

2. Petitioners' Argument Would Impermissibly Restrict Congressional Authority.

Second, Petitioners argue that Respondent's individual statutory right to real estate settlement services untainted by kickbacks has no bearing on whether she has alleged a concrete injury. Pet. Br. 22-25. Such an argument necessarily goes too far, for it would deny to Congress the authority to confer new substantive rights, the violation of which represents injury in fact and supports standing. See *Vt. Agency*, 529 U.S. at 773; *Warth*, 422 U.S. at 500; *Linda R.S.*, 410 U.S. at 617 n.3; *Sierra Club*, 405 U.S. at 738.

Petitioners propose a radical and untenable theory that would require overturning decades of settled precedent. Petitioners would limit Congress to the role of making legally actionable a plaintiff's injury that otherwise independently satisfies standing requirements. Pet. Br. 39. But if Congress' only power with respect to standing were to make an independently existing injury legally actionable, Congress would have no authority at all to confer new rights that create standing, for whether an injury is legally actionable is a question of the merits

of the plaintiff's case—a question independent of constitutional justiciability, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989); *Warth*, 422 U.S. at 500. Accordingly, Petitioners' theory flies in the face of the principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3. Petitioners' position would require every injury in fact to "exist without the statute" to count for standing purposes.[8]

To the extent Petitioners' theory posits that violations of RESPA cannot constitute an injury in fact unless Congress determined that such violations cause an economic harm in every individual case, see Pet. Br. 40-41, its argument is specifically foreclosed by precedent and ignores the need for judicial deference to congressional factfinding. This Court has held that statutes may create rights that establish standing even if they are "directed at avoiding circumstances of potential, not actual, impropriety." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224 n.14 (1974) ("We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury would be found in an invasion of that right.").

---

[8] Petitioners also argue at some length that Respondent does not have standing under principles of assignee standing. Pet. Br. 25 & n.12. Since Respondent has alleged a direct and personal harm *to herself* from Petitioners' violation of Respondent's rights under RESPA to real estate settlement services untainted by kickbacks, principles of assignee liability are irrelevant, and the Court need not address the issue in deciding this case.

Thus, Petitioners wrongly frame this case as a choice between two opposites. The first option, which Petitioners incorrectly ascribe to Respondent's position, would accord courts no role in deciding issues of standing whenever a statutory cause of action is involved. The second option, which Petitioners advocate, gives Congress no role in the standing inquiry, disregarding Congress's judgment that kickbacks in real estate settlement services cause harms and requiring a completely independent inquiry by courts. This Court's precedents, however, chart a more moderate and wiser alternative to these extremes. Where Congress has identified an injury but *failed* to relate that injury to a narrow class of potential victims who are entitled to bring suit, then courts have a role in enforcing the constitutional requirement that the particular plaintiff in a lawsuit have himself suffered an individualized injury. But where, as here, Congress has "'identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit,'" *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S., at 580 (Kennedy, J., concurring in part and concurring in judgment)), deference is due to Congress's judgment that plaintiffs have suffered a judicially cognizable injury, and a court must recognize the invasion of the substantive statutory right as injury in fact.

Petitioners' standing theories demean the legitimate role of Congress, which this Court repeatedly has recognized, in identifying and defining new injuries that establish constitutional standing. Contrary to Petitioners' assertions, recognizing Congress's role in defining new injuries complements, rather than undermines, the role of

courts in limiting their jurisdiction to the constitutional limits of Art. III's case or controversy requirement. Where Congress makes judgments (as it has in RESPA) that merit deference under this Court's jurisprudence, the judiciary can enforce plaintiff's statutory rights with confidence that Art. III's strictures are being fully effectuated.

II. RESPONDENT'S STANDING IS DEMONSTRATED BY THE FACT THAT SHE IS ASSERTING AN INDIVIDUAL RIGHT VIOLATED BY CONDUCT DIRECTED PERSONALLY AT HER.

Respondent's standing is confirmed by the fact that she alleges a violation of an individualized right personal to her, a characteristic that places this case well within the heartland of cases traditionally adjudicated in courts. Respondent's complaint arises directly out of a business transaction between Respondent and Petitioners by which Respondent paid Petitioners for services Petitioners were to provide to Respondent. More specifically, Respondent alleges that Petitioners, by paying Tower City for referring Respondent's title insurance to Petitioners, violated Respondent's right under RESPA to real estate settlement services untainted by a kickback.

Because Respondent is complaining about conduct of the Petitioners directed specifically at her, her complaint against Petitioners for violations of RESPA alleges paradigmatically individual rather than public injuries. See *Carter*, 553 F.3d at 989 ("RESPA does not authorize suits by members of the public at large; it authorizes suits only by

individuals who receive a loan that is accompanied by an unlawful referral, which is plainly an individualized injury."); *Alston*, 585 F.3d at 763 ("RESPA only authorizes suits by individuals who receive a loan accompanied by a kickback or unlawful referral, which is plainly a particularized injury, and the very injury pressed here."). This case thus easily satisfies the "imperatives of a dispute capable of judicial resolution": "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980).

The personalized injury Respondent asserts distinguishes this case from the public rights cases in which this Court has found that plaintiffs lack standing. See, *e.g.*, *Arizona Christian School Tuition Organization v. Winn*, – U.S. --, 131 S.Ct. 1436 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). Standing doctrine "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. "The province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 1 Cranch 137, 170 (1803). Standing requirements thus rest on "the twin ideas of public control over public rights and private control over private rights." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 694 (2004); see also Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 667 (2006) (observing that standing

doctrine reflects "a constitutional distinction between public remedies and private remedies").

The injury-in-fact requirement ensures that plaintiffs in federal court are asserting their own individual rights as opposed to the kinds of generalized public rights that should be pressed in the political branches. *Allen*, 468 U.S. at 750-52; *Chicago Junction Case*, 264 U.S. 258, 272-73 (1924) (Sutherland, J., dissenting); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights* , 93 Cornell L. Rev. 275, 277 (2008); Woolhandler & Nelson, *supra*, at 723, 733; see also *Lujan*, 504 U.S. at 577 (distinguishing "the undifferentiated public interest in . . . compliance with the law" from "an 'individual right' vindicable in the courts"); *Schlesinger*, 418 U.S. at 224 n.14 (holding that Art. III requires plaintiffs "to allege a specific invasion of [a] right suffered by him").

Thus, cases such as this in which a plaintiff alleges injury arising out of a violation of her individual rights almost always satisfy standing requirements, because violations of individual rights cause injuries personal to the plaintiff. Some commentators have gone so far as to argue that the injury-in-fact requirement is therefore "superfluous in cases alleging the violation of a private right." Hessick, *supra*, at 277. It is more accurate, however, to say that the violation of a private right usually constitutes an injury in fact sufficient for standing. Just as "there is ordinarily little question" that a person who is the object of government action has standing to sue to challenge the legality of the action, *Lujan*, 504 U.S. at 561, a person who is the object of private action that violates her individual

rights generally has standing to sue to challenge the legality of the action. In either situation, plaintiffs have standing to sue to complain about illegal conduct directed at them.[9]

Standing is more questionable, on the other hand, in situations in which the defendant's allegedly unlawful conduct is not directed at the plaintiff. See *Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."); *Allen*, 468 U.S. at 755 (noting cases in which the plaintiffs lacked standing to raise their civil rights claims "because [they] were not personally subject to the challenged discrimination"). Such cases may implicate public rights that are arguably less amenable to adjudication by the judiciary. It is thus especially relevant in such cases whether the plaintiff has suffered a particularized injury that can support standing or is merely asserting a generalized

---

[9] In the context of taxpayer standing, plaintiffs have framed their suits as challenges to the collection of taxes from them to be used for government expenditures that violate some constitutional or statutory provision—putatively, the collection of taxes from the plaintiff is conduct directed at him. This Court's precedents in such cases thus require a "nexus" between the government's collection of taxes from the plaintiff and the expenditure the plaintiff is challenging as illegal. See, *e.g.*, *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 606 (2007) (plurality); *Valley Forge Christian Coll.*, 454 U.S. at 506-08; *Flast v. Cohen*, 392 U.S. 83, 102 (1968). In most cases, however—including the present case—the defendant's conduct directed at the plaintiff is the same conduct that is challenged as illegal, therefore obviating the need to identify a nexus between what in the taxpayer cases are two different actions.

grievance based on impacts on him that are "undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937), and *Laird v. Tatum*, 408 U.S. 1, 13 (1972)); see also *Schlesinger*, 418 U.S. at 220 ("[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."). The mere fact that the injury is widely shared, however, does not deprive the plaintiff of standing so long as he or she has identified a particularized injury. *Massachusetts*, 549 U.S. at 522; *Akins*, 524 U.S. at 24.

In sum, the individualized nature of Respondent's injury shows injury in fact. *United States v. Hays*, 515 U.S. 737, 744 (1995); *Sierra Club v. Morton*, 405 U.S. 727 (1972).[10] Where, as here, a

---

[10] It is possible that a plaintiff alleging violation of a private right could nonetheless lack injury-in-fact. The harm necessary to satisfy the injury-in-fact requirement generally must have a direct impact on the plaintiff, not merely a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Sierra Club*, 405 U.S. at 734-35. In addition, conduct by a defendant that violates the terms of a contract with the plaintiff, but in a way that benefits the plaintiff, also would not create injury-in-fact. But the Court's precedent defines "injury" expansively—far more broadly than the quantifiable damages Petitioners' theory would require—to include an array of economic, non-economic, and informational harms that would easily encompass the injury that Congress found when it enacted RESPA and that Respondent has alleged in her complaint. See *Sierra Club*, 405 U.S. at 734; *Ass'n of Data Processing Serv. Org'ns v. Camp*, 397 U.S. 150 (1970); see also, *e.g.*, *Public Citizen*, 491 U.S. at 449-51 (denial of access to information represents Art. III injury); *Baker v. Carr*, 369 U.S. at 206 (holding that plaintiffs "who

plaintiff complains of conduct of the defendant that is directed personally at her, the injury is necessarily individualized.

III. RESPONDENT'S INJURY IS OF A TYPE TRADITIONALLY RECOGNIZED AS A LEGALLY COGNIZABLE HARM.

In the end, Petitioners' argument reduces to an assertion that they violated Respondent's statutory right to real estate settlement services untainted by kickbacks without harming her, a point rebutted in detail in Respondent's brief.

In any event, for present purposes, it suffices to note that Petitioners' argument depends on ignoring characteristics of Respondent's injury that this Court's precedent deems crucial: that Petitioners' conduct deprived Respondent of her substantive statutory right to real estate settlement services untainted by kickbacks, and that Petitioners' conduct was directed personally at Respondent. In enacting RESPA, Congress recognized that the victim of a kickback-tainted real estate settlement suffers an injury from the kickback—albeit one that may be difficult to prove in a particular case—and created a statutory remedy to compensate for that injury. Enforcement of the substantive right to untainted referrals does not require plaintiffs to

---

allege facts showing disadvantage to themselves as individuals have standing to sue"). Petitioners' attempts to argue that their conduct did not harm Respondent, despite the violation of her individual right to real estate settlement services untainted by a kickback, adopt a far too penurious view of both the facts of the case and of the scope of judicially cognizable injuries. See Part III, *infra*.

demonstrate the market effects that Petitioners demand.

Moreover, the rights and remedies Congress created in RESPA are of a type traditionally recognized in the common law of restitution without regard to proof of damages. For example, in discussing principles of agency law, this Court has flatly rejected the argument that a principal must demonstrate consequential losses from an agent's conflict of interest as a prerequisite of suit:

> It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency.

United States v. Carter, 217 U.S. 286, 305-06 (1910); *see also Michoud v. Girod*, 45 U.S. 503, 553, 557, 559 (1846); *Restatement (Third) of Agency* § 8.01; George

G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 543(P), at 382-83 (2d rev. ed. 1993).

Amici therefore urge the Court to reject Petitioners' unwarranted departure from well-established and fundamental principles of standing doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL LLP
1325 G St., N.W., Suite 500
Washington, DC 20005
(202) 652-4511
jmassey@masseygail.com

Dated: October 17, 2011

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

SUPREME COURT, U.S.
FILED
AUG 2 3 2011
OFFICE OF THE CLERK

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL D. LEFFEL
CONNOR A. SABATINO
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
608.257.5035

JAY N. VARON
Counsel of Record
JENNIFER KEAS
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
202.672.5300
jvaron@foley.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. PLAINTIFF'S CLAIMED INJURY SEEKS REDRESS FOR A RIGHT THAT DOES NOT EXIST IN RESPA OR OTHERWISE. 4

A. Plaintiff Attempts To Ground Her Claimed Injury And Theories In RESPA. 4

B. ABAs Are Accepted And Have A Long History Under RESPA. 6

1. ABAs are just another form of "vertical integration" that enable new entry into real estate service markets. 6

2. ABAs provide consumers with significant benefits. 7

3. The formation of ABAs often permits small companies to raise capital, add needed business expertise, and solve business succession issues. 9

C. Plaintiff's Claims Are Governed By RESPA Section 8 10

TABLE OF CONTENTS—continued

Page

D. RESPA Does Not Give Consumers A Right To Conflict-Free Referral Advice 11

1. Before 1983, RESPA did not address ABAs. 13

2. In 1983, Congress provided that ABAs were exempt from RESPA Section 8 scrutiny under three provisos. 14

3. Failure to disclose an ABA relationship is not a per se RESPA violation. 14

E. The Particular Violation Alleged Here—That First American Overpaid For Its Interest In The Agency—Is Not The Kind Of Thing That RESPA Was Designed To Address. 16

II. PLAINTIFF LACKS ARTICLE III STANDING. 17

A. Plaintiff Alleges No Pecuniary Injury. 20

B. Plaintiff Cannot Claim Standing On Any Asserted RESPA Requirement For An Impartial Referral. 22

TABLE OF CONTENTS—continued

Page

C. Plaintiff's Assertion Of A Breach Of Duty Of Loyalty Under RESPA Does Not Create Standing. 25

III. RESTRICTING PRIVATE DAMAGE RECOVERIES TO SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN WILL NOT CUT OFF LEGITIMATE RESPA CLAIMS. 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Wright, 468 U.S. 737 (1984) 17, 21
ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 21
AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) 28
Camreta v. Greene, 131 S. Ct. 2020 (2011) 5
Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009) 12
City of Boerne v. Flores, 521 U.S. 507 (1997) 17, 18
Collins v. FMHA-USDA, 105 F.3d 1366 (11th Cir. 2010) 24
DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 17
FEC v. Akins, 524 U.S. 11 (1998) 25
First Fed. Sav. & Loan Ass'n v. Greenwald, 591 F.2d 417 (1st Cir. 1979) 29-30
Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000) 17, 21
Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir. 2002) 8-9
Gollust v. Mendell, 501 U.S. 115 (1991) 18
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) 28
In re Senior Cottages of Am., LLC, 482 F.3d 997 (8th Cir. 2007) 24
Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 26

Loren v. Blue Cross & Blue Shield of Mich.,
505 F.3d 598 (6th Cir. 2007) 26-27

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 23

McCullough v. Howard Hanna Co.,
No. 1:09cv2858, 2010 WL 1258112
(N.D. Ohio Mar. 26, 2010) 12-13

Minter v. Wells Fargo Bank, N.A.,
No. WMN-07-3442, 2011 WL 1675262
(D. Md. May 3, 2011) 15

Pettrey v. Enterprise Title Agency, Inc.,
241 F.R.D. 268 (N.D. Ohio 2006) 15

Public Citizen v. United States Dep't Justice,
491 U.S. 440 (1989) 25

Raines v. Byrd, 521 U.S. 811 (1997) 17-18, 19

Schuetz v. Banc One Mortgage Corp.,
292 F.3d 1004 (9th Cir. 2002) 29

Summers v. Earth Island Inst.,
555 U.S. 488, 129 S. Ct. 1142 (2009) 17, 18, 23

Valley Forge Christian College v. Ams. United for Separation of Church & State,
454 U.S. 464 (1982) 18

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 17

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 27

Warth v. Seldin, 422 U.S. 490 (1975) 19-21

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. III ..... *passim*

STATUTES

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, §§ 1011(a), 1012(a)(10), 1002(12)(m), 1061-62 (2010) 29

Real Estate Settlement Procedures Act of 1974 (as amended), 12 U.S.C. §§ 2601-2607

12 U.S.C. § 2601(b)(2) 3, 16
12 U.S.C. § 2602(7) 6
12 U.S.C. § 2602(8) 6
12 U.S.C. § 2603 24
12 U.S.C. § 2604(c) 24
12 U.S.C. § 2607 ..... *passim*
12 U.S.C. § 2607(a) ..... *passim*
12 U.S.C. § 2607(b) 3, 10
12 U.S.C. § 2607(c) 24
12 U.S.C. § 2607(c)(1)(B) 10, 23
12 U.S.C. § 2607(c)(2) 10
12 U.S.C. § 2607(c)(4) ..... *passim*
12 U.S.C. § 2607(d)(2) 15, 28
12 U.S.C. § 2607(d)(3) 15
12 U.S.C. § 2607(d)(4) 29
12 U.S.C. § 2607(d)(5) 28

RULES, REGULATIONS AND REGULATORY MATERIALS

24 C.F.R. § 3500.14(d) 11

Amendments to Regulation X, the RESPA regulation, 59 Fed. Reg. 37,360 (July 21, 1994) 8

Effect on RESPA on Certain Practices Known as Controlled Business, 45 Fed. Reg. 49,360 (July 24, 1980) 13

Fed. R. Civ. P. 23 27

HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements 10

In re Request for Comment on Proposed Amendments to the Regulations Implementing RESPA, Docket No. FR-5180-P-01, at 30 (June 11, 2008) http://www.ftc.gov/os/2008/06/v080012respa.pdf 8

Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) 22

Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq* (Sept. 19, 1996) 23

Withdrawal of Prior Notice Regarding RESPA, 47 Fed. Reg. 21,304 (May 18, 1982) 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 97-532 (1982) 12

HUD'S Proposed RESPA Rule: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 110th Cong. 138 (2008) 8

Impact of Regulations Under the Real Estate Settlement Procedures Act on Small Business: Hearing before the H. Comm. on Small Bus., 103rd Cong. 32 (1993) 14

MISCELLANEOUS AUTHORITIES

HOUSING AND URBAN DEVELOPMENT: RESPA SETTLEMENT AGREEMENTS, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/resetagr (last visited Aug. 26, 2011)..... 29

Weston E. Edwards, *Competition at the Point of Sale*, 56 Mortg. Banking 129 (Oct. 1995). 26

STATEMENT OF INTEREST[1]

Amicus Curiae RESPRO®—the Real Estate Service Providers Council, Inc.—is a non-profit trade association comprised of more than 150 members from all segments of the residential home buying and financing industry whose common bond is to offer so-called "one-stop shopping programs" for homebuyers through alliances, contractual agreements and arrangements known under the Real Estate Settlement Procedures Act ("RESPA") as "affiliated business arrangements" or "ABAs." These include joint ventures, parent-subsidiary relationships, minority investments in existing providers, strategic alliances and marketing agreements to name a few.

RESPRO is particularly interested in this case because the investment in another settlement service provider, like that made by Petitioner here, is a common course of conduct engaged in by RESPRO members. Indeed, because such investments and the formation of ABAs are a form of "vertical integration" that enable new entry into real estate service markets and increase competition and service levels, the work of ABAs is often challenged. This is not unlike in earlier days when large supermarkets, chain stores, or other new business models had to defend against unfair and anti-competitively

---

[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus, its members, or their counsel made a monetary contribution to this brief's preparation or submission.

motivated attacks. The irony here, however, is that the majority of RESPRO members—which primarily consists of real estate brokerage firms, title agencies, escrow companies, home warranty companies, and mortgage lenders or brokers—are privately owned and or relatively small businesses. Indeed, the formation of ABAs often permits small, family owned, companies to raise capital, add needed business expertise, and solve business succession issues.

Since 1992, RESPRO has advocated for a legal and regulatory environment that promotes and does not unreasonably discriminate against one-stop shopping programs and ABAs. RESPRO also consistently provides regulatory compliance programs and publishes guides and articles about RESPA, ABAs, and relevant industry issues, and regularly testifies and comments on proposed legislation or regulations in the consumer finance area. RESPRO has authored several other amicus briefs on these issues and some of its members have seen first hand the frustration of being defendants in putative class actions where the named plaintiffs after closing have sent thank you notes and presents to the companies they later have been convinced to sue. As such, RESPRO can provide a valuable perspective to the underlying issues in this case and the plaintiff's asserted injury.

SUMMARY OF ARGUMENT

Amicus seeks to make three main points. First, based on the text of statute and its accompanying regulatory history, it is clear that Congress did not define an injury that would confer standing absent a violation that adversely impacted the plaintiff. Section 8(a) of RESPA, on which Plaintiff Denise

Edwards seeks to base her only claim, was designed to protect consumers' pecuniary interests by deterring improper "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2); *see also* 12 U.S.C. § 2607(a). While Plaintiff alleges to the contrary, investment in title agencies or affiliated business arrangements ("ABAs") do not improperly facilitate referral fees or otherwise violate RESPA. Rather, Congress created an express safe harbor exemption for ABAs; it did not prohibit them per se in any way shape or form. Moreover, participating in a settlement transaction with an ABA, even one which does not meet RESPA's safe harbor exemption test, does not necessarily give rise to a pecuniary injury for the homebuyer or home seller. ABAs generally provide consumers with convenience, accountability and often lower prices. In any event, they do not constitute a RESPA violation absent proof of the elements of a Section 8(a) or 8(b) violation.

Second, Plaintiff's asserted injury does not confer Article III standing. She has not alleged any pecuniary injury. She cannot base her claim on standing on some asserted right to an impartial referral because RESPA does not create such a right. In fact, RESPA approves of exclusive referrals (therefore, presumably "partial") in some circumstances. Nor can she assert standing based on an alleged breach of a duty of loyalty, because nothing in Section 8(a) of RESPA gives rise to such a duty.

Third, Plaintiff should not be permitted to avoid pleading a traditional injury-in-fact just to increase the likelihood of obtaining a certified class. Even

meritless class actions can create overwhelming pressure on defendants, particularly when the statute at issue permits the recovery of treble damages. The appropriate balance is to permit plaintiffs who can actually allege a traditional injury-in-fact to pursue their claims. In addition, federal and state agencies are empowered to, and have, enforced RESPA. Settlement service practices are also governed by state laws. Thus, there exists adequate measures to ensure RESPA's goal of avoiding kickbacks or referral fees that unnecessarily increase settlement costs.

ARGUMENT

I. PLAINTIFF'S CLAIMED INJURY SEEKS REDRESS FOR A RIGHT THAT DOES NOT EXIST IN RESPA OR OTHERWISE.

A. Plaintiff Attempts To Ground Her Claimed Injury And Theories In RESPA.

Pursuant to RESPA Section 8(a), the Plaintiff, Denise Edwards, alleges that First American unlawfully paid a "kickback" to numerous title agencies by purchasing an interest in the agencies for more than their market value, in expectation of future referrals. App. 58a (Compl. ¶ 41).[2]

Plaintiff does not claim that she suffered any financial or other actual harm, since, as the Court of Appeals recognized, she does not contend that these alleged kickbacks increased the cost of her title

---

[2] Citations to the Appendix accompanying the petition for a writ of certiorari are cited as "App. _" and citations to the Joint Appendix are cited as "J.A. _."

insurance or otherwise affected the quality of services she received from First American. *See, e.g.*, App. 4a; App. at 49a (Compl. ¶ 5) (complaining only of allegedly missing "information about the costs").

Nonetheless, Plaintiff's theory is that "RESPA gives homebuyer a right to conflict-free referral advice" (*i.e.*, a statutory right to an impartial referral for settlement services). Respondent's Brief in Opposition (hereafter, "Br. in Opp.") at 21; *see also* App. 19a. As explained below, this theory does not correspond to any right that exists in RESPA or otherwise.

Similarly, although it is not alleged in her complaint, Plaintiff asserts that the Defendants breached a "duty of loyalty" that she suggests is created by RESPA. Br. in Opp. at 21-22. RESPA also does not create such a duty.

This Court is only addressing question two from the petition for a writ of certiorari, regarding Article III standing and not whether there is statutory standing under RESPA. However, an understanding of RESPA and ABAs may help to shed light on the constitutional inadequacy of Plaintiff's asserted injuries.[3] Below, Amicus discuss the relevant aspects of both.

---

[3] Alternatively, this Court could decline to reach the constitutional issue if nonconstitutional grounds exists that could resolve this case. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).

B. ABAs Are Accepted And Have A Long History Under RESPA.

1. ABAs are just another form of "vertical integration" that enable new entry into real estate service markets.

An ABA essentially exists where one residential real estate service provider has an ownership interest, whole or partial, in another residential real estate service provider, not unlike when an auto company buys a parts company or a drug company buys distributors. Specifically, RESPA defines ABAs as arrangements in which:

> (A) a person who is in a position to refer business incident to or part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person,[4] has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such person directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

12 U.S.C. § 2602(7). Thus, ABAs arise when real estate providers have cross-ownership interests in other providers and refer or endorse their affiliate(s) to consumers.

---

[4] The term "associate" is a catchall phrase that includes certain family members of the referring person, as well as various business associates. *See* 12 U.S.C. § 2602(8).

2. ABAs provide consumers with significant benefits.

For a residential real estate transaction to close successfully, many moving parts must come together. Once a real estate broker assists a consumer in finding a home, the homebuyer generally requires mortgage financing and the parties and the lender typically obtain title insurance to ensure that the title to the property is clear, and homeowners insurance to protect the underlying property. And of course, someone—a title company, escrow company, or lawyer—must close the transaction and help transfer the property. If any one of these providers does not do its job, the transaction will not close. Thus, one critical reason why residential real estate settlement service providers have formed ABAs is to coordinate and ensure these services are provided with the desired level of quality.

From the consumer perspective, ABAs also provide a one-stop shopping alternative that can facilitate the closing of the transaction. A consumer need not hunt down five different providers. Rather, when talking to a real estate brokerage firm, the customer might learn about or even meet a mortgage lender, independent title agency, title insurer, and/or escrow company, who have experience working together. Moreover, because the companies are affiliated, there is some accountability. Instead of a title agent and a mortgage lender pointing fingers at each other when a problem exists that could threaten a closing, they will work together toward resolution.

Contrary to some charges leveled at ABAs, economic studies show that in practice the convenience and accountability of one-stop shopping

do not cost extra and can actually cost less. *See HUD'S Proposed RESPA Rule: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 110th Cong. 138 (2008) (statement of David H. Stevens, then-President of Affiliated Businesses, Long & Foster Companies, on behalf of RESPRO) (in 2009, Mr. Stevens subsequently served as the Department of Housing and Urban Development ("HUD") Assistant Secretary and Federal Housing Administration Commissioner). Indeed, HUD and other regulators have consistently acknowledged the benefits that ABAs (previously called "controlled business arrangements" or "CBAs"), offer to consumers. *See, e.g.*, Amendments to Regulation X, the RESPA regulation, 59 Fed. Reg. 37,360, 37,361 (July 21, 1994) ("[ABAs] and so-called 'one-stop shopping' may offer consumers significant benefits including reducing time, complexity, and costs associated with settlements").[5] Thus, there are numerous legitimate and pro-competitive justifications for forming an ABA.[6]

---

[5] *See also In re Request for Comment on Proposed Amendments to the Regulations Implementing RESPA*, Docket No. FR-5180-P-01, at 30 (June 11, 2008) http://www.ftc.gov/os/2008/06/v080012respa.pdf ("Bundling related services can create efficiencies in–lower the costs of–providing those services, and discounting the bundle allows consumers to pay less for the services.").

[6] While Plaintiff insinuates that ABAs are simply designed to facilitate referral payments or kickbacks, and frequently refers to the First American "scheme" in this case, as if there were some preconceived attempt to deceive, a RESPA Section 8(a) claim contains no element of intent. *See Glover v. Standard Fed. Bank*, 283 F.3d 953, 964-65 (8th Cir. 2002) (rejecting

3. The formation of ABAs often permits small companies to raise capital, add needed business expertise, and solve business succession issues.

The great majority of RESPRO's members are non-publicly traded companies, and include many relatively small, family-owned companies struggling with what has been a very difficult real estate market. For many of these entities, and countless others, an ABA business model can provide needed capital and needed expertise, each of which helps smaller companies compete in the marketplace and better finance their businesses. Indeed, as HUD noted in its Economic Analysis accompanying its June 7, 1996 final RESPA regulation:

> there is some reason to expect that referrals among affiliated firms may reduce costs to business and consumers. Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement

---

argument that payments for a referral were automatically illegal under RESPA Section 8(a) because "inventive minds making clever arguments can turn virtually *any* payment flowing from a lender to a broker, in connection with the payment of a mortgage loan, into a purported placement for the unlawful referral of business;" such an argument would "clash" with Section 8(c), which expressly permits reasonable payments for goods and services even when done in connection with a referral) (emphasis in the original). As the *Glover* court recognized, Section 8(c) exempts from liability payments made for fair value, regardless of intent or whether those payments accompany a referral, *id.* at 964, and also exempts ABAs that meet its three safe harbor requirements. 12 U.S.C. § 2607(c)(4).

service provides. In the long run, any cost savings should be passed on to consumers in most cases.[7]

C. Plaintiff's Claims Are Governed By RESPA Section 8.

Plaintiff's claim here is that Petitioners violated Section 8(a) of RESPA which prohibits "any person" from giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(b) prohibits certain unearned fees. 12 U.S.C. § 2607(b). Together, these are the RESPA Section 8 prohibitions.

However, RESPA also provides that certain courses of conduct are exempt from these prohibitions. "[T]he payment of a fee . . . by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance," is, for example, exempt. 12 U.S.C. § 2607(c)(1)(B). Any payment that is reasonably related to the fair value of a service, good, or facility furnished also is exempt. *Id.* at 2607(c)(2). In addition, RESPA provides a safe harbor exemption for ABAs under Section 8(c)(4), which provides:

---

[7] HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements.

> Nothing in this section [i.e., RESPA § 8] shall be construed as prohibiting . . . affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred . . . , (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship.

12 U.S.C. § 2607(c)(4).

D. RESPA Does Not Give Consumers A Right To Conflict-Free Referral Advice.

One assertion made by Plaintiff Edwards in this case (Br. in Opp. at 21) and often made in other RESPA cases, is that RESPA was designed to give consumers an impartial (or "conflict-free") referral for settlement services. This is plainly untrue. When one reviews the provisions of Section 8 discussed above, it is clear that all that is prohibited is a payment in exchange for a referral of settlement services. Referrals themselves are nowhere proscribed in any case where the referring party does not receive a "thing of value."[8] Thus, it is not

---

[8] "Thing of value" is broadly defined and not only encompasses the payment of monies, but also covers the offering of discounts, the provision of free services and goods and so on. *See generally* 24 C.F.R. § 3500.14(d). But it does not include obtaining a

surprising that referrals of services are lawfully made to friends, relatives, customers, and entities with whom long established business relationships exist.

The notion that impartial referrals were desired apparently comes from a misreading and improper characterization of Section 8(c)(4) of RESPA as an outlawing of ABAs unless certain conditions are satisfied.[9] In fact, however, Congress did not prohibit ABAs. Rather, as the plain text of the statute reveals, it gave ABAs a safe harbor that exempts participants in ABAs from application of Section 8 under certain conditions (including certain required disclosures). What Edwards and numerous others misconstrue is that if a participant in an ABA does not meet the test for an exemption, there is no automatic RESPA violation unless the elements of a violation are proven and no other exemption applies. *See, e.g., McCullough v. Howard Hanna Co.*, No.

---

feeling of confidence, satisfaction, or well-being that you have made a referral to someone whom you think will do a good job, or who needs the work, or whom is a friend. And nowhere in RESPA is there an obligation to disclose why a referral is made or a standard that the absolutely best referral (assuming that could even be defined) must be made.

[9] Some courts have reached this conclusion by relying on comments from a House Report submitted in conjunction with the 1983 amendments to RESPA. *See, e.g., Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 987 (6th Cir. 2009) (citing H.R. Rep. No. 97-532 (1982)). While that Report expressed concern about a referrer "los[ing] its impartiality," Hr. Rep. No. 97-532 at 52 (1982), as noted above, Congress did not ban referrals that are not "impartial" and clearly permitted express referrals.

1:09cv2858, 2010 WL 1258112 at *3 (N.D. Ohio Mar. 26, 2010) (citing additional cases); *cf. infra* note 11.

1. Before 1983, RESPA did not address ABAs.

Congress enacted RESPA in 1974. Before 1983, when Section 8 of RESPA introduced an exemption for ABAs (then known as controlled business arrangements or "CBAs"), 12 U.S.C. § 2607(c)(4), there was no provision expressly prohibiting or regulating such arrangements. In the summer of 1980, HUD published a Federal Register notice (labeled an "interpretative rule"), which HUD said was issued in response to public inquiries about "controlled business." *See* Effect on RESPA on Certain Practices Known as Controlled Business, 45 Fed. Reg. 49,360 (July 24, 1980). This notice stated that a "'controlled business' relationship *may* be a violation of Section 8," but did not really explain how or when this could occur. *Id.* (emphasis added). Two years later, HUD withdrew the 1980 interpretative rule. HUD had received "severe criticism" for failing to address the real question—"whether, or under what circumstances, a return on capital invested which did *not* vary in proportion to volume or value of business referred" was impermissible—and for implying that CBAs might be illegal per se. *See* 47 Fed. Reg. 21,304, 21,304 (May 18, 1982). HUD replaced its original notice with one clarifying that ABAs were not per se illegal but that a problem could be raised if returns of capital were based on referrals rather than ownership interests—a concern that Plaintiff has not raised here. *See id.*

2. In 1983, Congress provided that ABAs were exempt from RESPA Section 8 scrutiny under three provisos.

In 1983, Congress passed what is currently the affiliated business arrangement exemption: Section 8(c)(4) of RESPA. At the Housing Subcommittee markup of the bill, a proposal to limit or prohibit CBAs by permitting them in only a small percentage of transactions was raised but ultimately rejected.[10] Thus, Congress ultimately passed the ABA "exemption" but declined to otherwise prohibit or regulate ABAs. The exemption as enacted, quoted above, places ABAs beyond Section 8 scrutiny if the parties satisfy three provisos: (1) make the appropriate disclosure to the consumer; (2) do not require use of the ABA; and (3) receive returns based on ownership interests rather than referrals. *See* 12 U.S.C. § 2607(c)(4).

3. Failure to disclose an ABA relationship is not a per se RESPA violation.

Participants in ABAs who want to take advantage of the 8(c)(4) exemption should provide the

---

[10] Representative Jerry M. Patterson proposed placing a fifty percent limitation on arrangements involving title companies, meaning that a title company participating in a transaction involving a CBA for that company would have to obtain fifty percent of its business from outside referrals. Patterson argued this restriction would require the entity to demonstrate that it could compete successfully in the marketplace. *See Impact of Regulations Under the Real Estate Settlement Procedures Act on Small Business: Hearing before the H. Comm. on Small Bus.*, 103rd Cong. 32, at 187-89 (1993).

required disclosure describing the arrangement as HUD has specified. However, simply because a disclosure is not made or not made properly does not mean that the participant violated Section 8 of RESPA such that they can be held liable for three times the value of the settlement service involved in the alleged violation. 12 U.S.C. § 2607(d)(2). A plaintiff making such an allegation would still be required to show that the referring party obtained a referral fee in exchange for the referral or that an unearned fee was received in violation of Section 8(b). Claims to the contrary are not consistent with RESPA's plain statutory language[11] and do not support Edwards's claim that she has sufficient

---

[11] Two courts—*Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268 (N.D. Ohio 2006) and *Minter v. Wells Fargo Bank, N.A.*, No. WMN-07-3442, 2011 WL 1675262, at *10 (D. Md. May 3, 2011), have ignored that Congress created an ABA safe harbor exemption, not a prohibition, and have seized on language in Section 8(d)(3) of RESPA to conclude that a failure to comply with all of Section 8(c)(4)'s requirements is an automatic RESPA violation. Section 8(d)(3) in essence provides that no person should be held to violate or not to comply with the ABA safe harbor disclosure component if, even though they did not provide a disclosure in a particular case, they show that "such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error." 12 U.S.C. § 2607(d)(3). Based on this language, which obviously was intended not to convert an inadvertent error into an automatic disqualification from the exemption, these courts contend that the ABA safe harbor provisions are mandatory and failure to adhere to them are automatic RESPA "violations." Amicus respectfully suggests that such an interpretation is contrary to the overall statutory framework of RESPA and is erroneous.

injury to prosecute a RESPA claim for damages based on the incorrect premise that she had a right to an impartial referral or to some referral free of a tainted market.

E. The Particular Violation Alleged Here—That First American Overpaid For Its Interest In The Agency—Is Not The Kind Of Thing That RESPA Was Designed To Address.

As part of her claim Plaintiff asserts that First American overpaid for its interest in Tower City Title. Accepting that allegation as true does nothing to establish Plaintiff's injury. The theory that overpaying for an interest in a title agency somehow secured future referrals is inherently speculative, raising a seeming myriad of issues about whether putative class members were in fact referred within the meaning of RESPA, and referred in exchange for that overpayment. However, even assuming that this could be proven for each putative class member, regardless of how long ago this "overpayment" was made, it can not permit consumers to recover damages if, as is the case here, no separate injury-in-fact was alleged or occurred.

The theory underlying the enactment of RESPA was that referral fees tended to increase the amount of settlement service costs. *See* 12 U.S.C. § 2601(b)(2). But here, where there is an allegation of overpayments made years ago for a minority interest in a title agency (App. 51a-52a (Compl. ¶ 16)), and where there is no showing that title costs increased or that individual consumers were harmed, there can be

no private recovery of damages under RESPA and certainly no Article III standing.

II. PLAINTIFF LACKS ARTICLE III STANDING.

This Court has repeatedly recognized the important limitation on judicial power reflected in Article III's standing requirement. Adopting the view of the Ninth Circuit in this case would significantly limit Article III's force and permit Congress to undermine the separation-of-powers principle grounded in it. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1148 (2009); *cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Article III provides that the "judicial Power" of the United States can be applied only to decide "Cases" and "Controversies." U.S. Const. Art. III. This Court has interpreted Article III to require that: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 80-81 (2000).

The central issue in this case is whether Plaintiff has alleged an "injury-in-fact." That is, "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The Constitution does not permit Congress to simply dispense with Article III's standing requirement by adopting a statute. *Raines*

v. Byrd, 521 U.S. 811, 820 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing."); *see also Valley Forge Christian College v. Ams. United for Separation of Church & State*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III.").

In other words, even when Congress grants a party the right to sue for relief based on a defendant's violation of a federal statute, that is not in itself sufficient to confer standing. *See id.; see also, e.g., Gollust v. Mendell*, 501 U.S. 115, 125 (1991) (Securities Exchange Act of 1934 could not be interpreted to permit party later "divested of any interest in the outcome of the litigation" to pursue claim because of "serious constitutional doubt whether" such a plaintiff "could demonstrate the standing required by Article III's case-or-controversy limitation"). Thus, courts must determine, even when plaintiffs are pursuing claims under such statutes, that Article III's separate requirements for showing an injury-in-fact are satisfied. *See id.*; *see also Summers*, 129 S. Ct. at 1149; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Here, the Ninth Circuit held Article III standing existed based on its conclusion that RESPA created a cause of action addressing Defendants' conduct. The Ninth Circuit summed up its holding this way: "Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue

her claims against Defendants." App. 7a;[12] *see also id.* at 5a ("Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III.").

The Ninth Circuit based this conclusion on a misinterpretation (App. at 4a) of this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975), wherein this Court stated: "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). However, reading *Warth*, and this Court's other Article III cases, in context, demonstrates that Congress cannot simply create a legal right out of whole cloth and thereby create standing. "Art. III's requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself." *Id.* at 501; *see also Raines*, 521 U.S. at 820 n.3. The plaintiff must "allege specific, concrete facts demonstrating that the challenged practices harm *him*." *Warth*, 422 U.S. at 508 (emphasis provided).

Under a proper Article III analysis, it is clear that Plaintiff lacks standing because she failed to allege any injury-in-fact. She alleges no pecuniary injury, no informational injury, and no other form of

---

[12] Amicus are not conceding that Plaintiff has even statutory standing under RESPA to pursue her claim, but limits its discussion in this brief to the Article III standing question upon which this Court granted the petition for a writ of certiorari.

"distinct and palpable" injury to herself or imminent threat of such injury. *Id.* at 501.

A. Plaintiff Alleges No Pecuniary Injury.

It is undisputed that, based on the State of Ohio's filed rate regulatory regime, all title insurance available in Ohio at the time of Plaintiff's purchase was offered at the same price. App. 14a (noting that Plaintiff "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"); *cf.* Br. in Opp. at 6 & n.3. As recognized below, Plaintiff does not allege that "the charge for title insurance was higher than it would have been without the [alleged] exclusivity agreement." App. 4a. "Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price." *Id.* Plaintiff also does not allege she received inadequate (or less) value from First American. In other words, she does not allege that she could have received better service from another title insurer.

Plaintiff, however, asserts that "the absence of an 'overcharge'" is not the same as "the absence of economic injury." Br. in Opp. at 22. That may be true in general, but Plaintiff does not adequately allege any economic injury.

In opposition to certiorari, Plaintiff claims she suffered an "economic injury" resulting from "systemic effects" of "reverse competition" in pricing of title insurance. *Id.* This too is inadequate to confer standing for three reasons.

First, as noted above, Plaintiff does not allege that she was actually charged and paid a price higher

than she would have if there had not been the alleged exclusive agreement. App. 4a. The allegation simply is not in the Complaint.

Second, the suggestion that the Defendants' conduct resulted in the title insurance market in Ohio having higher prices on a "systemic" basis is pure conjecture. "Hypothetical assumptions," *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989), and unsubstantiated, but "remote possibilities," "that [plaintiff's] situation might have been better had [the defendants] acted otherwise," do not suffice to establish standing. *Warth*, 422 U.S. at 507.

Finally, standing is also lacking when the alleged injury is "highly indirect and 'result[ed] from the independent action[s] of some third part[ies] not before the court.'" *Allen*, 468 U.S. at 757 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). Here, in her opposition to certiorari, Plaintiff states that it is because the "industry is so concentrated," not the relationship between First American and Tower City, that has caused prices to be set where they are in Ohio. Br. in Opp. at 6 n.4.

In short, unable to assert that she was overcharged for title insurance, Plaintiff cannot obtain standing based on unpleaded and belated hypotheticals and implausible conjecture that, in any event, is not "fairly traceable to the challenged action of the defendant[s]." *Friends of the Earth*, 528 U.S. at 180.

B. Plaintiff Cannot Claim Standing On Any Asserted RESPA Requirement For An Impartial Referral.

In her opposition to certiorari, Plaintiff asserts that: "RESPA gives homebuyer [sic] a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement). The invasion of that statutory right is an injury conferring standing." Br. in Opp. at 21. That is incorrect.

a. Plaintiff has acknowledged that exclusive referral agreements—which could hardly be called "impartial"—are permitted under RESPA. Reply Br. of Appellant-Petition at 2, *Edwards v. First Am. Corp.*, No. 08-56536 (9th Cir. Apr. 20, 2009) ("[T]itle companies may have exclusive relationships with title insurers" under RESPA.).

As noted above, far from establishing a right to impartial (or "conflict-free") referrals, Congress did not ban exclusive referrals in RESPA and HUD has issued a policy statement about affiliated business arrangements which makes clear its understanding that exclusive referrals are permissible. *See* Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) (discussing ABAs and their referral process). In reviewing guidelines that it utilizes, HUD cites an example of an exclusive referral agreement as permissible. *Id.* p. 29,264 ("[U]pon review there appears to be nothing impermissible about these [exclusive] referrals of title business from the title agency to the title insurance company.").

HUD has also noted that it is permissible for a title insurance agent to make what are the equivalent of exclusive referrals to title insurance companies when the agent performs certain defined "core title services." Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996). HUD has interpreted such conduct to be consistent with RESPA's provision that permits the payment of a fee "by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance," 12 U.S.C. § 2607(c)(1)(B). *Id.*

Thus, Plaintiff cannot base her standing argument on any right to an "impartial" referral.[13]

b. Likewise, Plaintiff cannot base her Article III standing argument on her suggestion that she has a right to a "timely disclosure" of the existence of the AMA or other factors relating to the referral. Br. in Opp. at 21.[14]

---

[13] Similarly, the government argued in its brief on certiorari that the right to "conflict-free" advice is akin to a procedural right to a conflict-free judge. U.S. Inv. Br. 12. However, the denial of a procedural right alone is not sufficient to confer Article III standing. *See Summers*, 129 S. Ct. at 1151. The denial of the procedural right must "impair[]" some other "concrete interest[]" that arises to an injury-in-fact in its own right. *Summers*, 129 S. Ct. at 1151; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992).

[14] As noted above, in her Complaint, Plaintiff complains about a failure to disclose "critical information about the cost of title insurance" (App. 49a (Compl. ¶ 5)), but it is clear from the context of the paragraph containing this allegation and her later filings that the asserted right to information relates to a

As noted above, RESPA does not provide a party the right to know about an ABA arrangement per se. The disclosure of the relationship is only a defense to what would otherwise be considered a violation of Section 8(a). *See* 12 U.S.C. § 2607(c)(4); *see also supra* Part I.D. 2-3. While other sections of RESPA affirmatively require disclosure (for example, a right to receive a HUD-1 settlement statement, 12 U.S.C. § 2603, or a good faith estimate, 12 U.S.C. § 2604(c)), there is no affirmative obligation to disclose an ABA arrangement and even these other disclosure rights are not privately enforceable.[15]

The alleged failure of a defendant to make a disclosure consistent with the ABA exception in Section 8(c), however, does not by itself create an injury-in-fact. First, Plaintiff has not alleged how this type of disclosure affected her transaction. In fact, she has stated that "disclosure is . . . irrelevant" to her claims. J.A. 115. Second, standing should not hinge on the existence of a defense. The existence of a valid defense may mean that the plaintiff's claim is ultimately doomed, but it does not enter into the standing determination. *See, e.g., In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1004 (8th Cir. 2007) ("The existence of a defense to a cause of action does not deprive the plaintiff of standing.").

Plaintiff also cannot base her claim of standing on some more general claim of a right to unspecified

---

disclosure of the allegedly "exclusive (and secret) referral agreements," (*id.*).

[15] *See, e.g., Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir. 2010).

information about the "cost" of title insurance, especially in a state where cost is identical for title policies of all underwriters. When this Court has recognized an injury-in-fact relating to a party's non-receipt of information, it has been when the inability to obtain the information has caused some other distinct injury. In *FEC v. Akins*, 524 U.S. 11 (1998), this Court held that the information about the political committee in question would help the voters (the petitioners) "to evaluate candidates for public office." *Id.* at 21. In *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989), the plaintiff wanted access to meetings and records of the American Bar Association relating to the "judicial selection process" so that it could "monitor its workings" and more effectively participate in that process. The Court considered this a "concrete and particularized" harm because the individual sought and was denied specific information. *Id.* at 448-49.

Here, and it bears repeating, Plaintiff has not alleged that she was requesting any particular information or, more importantly, how that information would have altered her settlement in any way.

C. Plaintiff's Assertion Of A Breach Of Duty Of Loyalty Under RESPA Does Not Create Standing.

At the certiorari stage, in connection with her assertion of a right to a disclosure of the ABA status of Defendants, Plaintiff also suggested that she has somehow been injured by Defendants' breach of a "duty of loyalty" owed to her and that, based on this breach, she has been injured by way of deprivation of

"property, contracts, and torts." Br. in Opp. at 21-22. Not surprisingly, Plaintiff never pled such an injury in her complaint. Moreover, RESPA does not create any such duty of loyalty under Section 8(a) that could form the basis of Plaintiff's now alleged injury-in-fact.

To read into Section 8(a) of RESPA a "duty of loyalty" would be contrary to its language and intent and would increase the potential liability of service providers like Amicus's members without reason or authority. Section 8(a) prohibits certain referral fees. It does not call on settlement service providers to act as agents for, or establish a fiduciary duty with, their customers.[16]

Even if Section 8(a) did somehow create a duty of loyalty, there still must be some underlying distinct injury-in-fact for Plaintiff to have Article III standing. *See, e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting argument in ERISA action that "deprivation of [an] entitlement to [a] fiduciary duty . . . constitute an injury-in-fact sufficient for constitutional standing"); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09 (6th Cir. 2007) ("Thus, even where statutory standing pursuant to

---

[16] Nevertheless, most referring parties take their referrals very seriously because if they are not good referrals, they will get blamed and the repeat customer they are looking for will not materialize. Indeed, as one authoritative source noted, this is why in order to get a good capture rate in an ABA, you need great service and great rates, not just an ABA since agents will be skeptical and afraid to make a bad referral. Weston E. Edwards, *Competition at the Point of Sale*, 56 Mortg. Banking 129 (Oct. 1995).

ERISA is satisfied, the elements of Article III must be met."). Here, Plaintiff has alleged no such underlying form of injury.

III. RESTRICTING PRIVATE DAMAGE RECOVERIES TO SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN WILL NOT CUT OFF LEGITIMATE RESPA CLAIMS.

Amicus is not suggesting that claims under RESPA based on compensated referrals are never actionable. In theory a plaintiff could be overcharged (in some states) or have a basis for a claim about the level of service he or she received, or some other concrete and particularized injury traceable to the defendant's conduct. To have Article III standing, however, those types of injuries must be alleged, and here they were not. Moreover, where the claim is brought as a class action for damages, they must be provable with common evidence and facts that predominate. *See* Fed. R. Civ. P. 23; *see also, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

Here, Edwards, has not (and apparently, based on her testimony, cannot allege) any overcharge or dissatisfaction with the level of service she received. In short, she is complaining about nothing.

Perhaps she has chosen to plead her claims in the way she has in order to make it more likely that a class could be certified, to claim as she does that "all

of the" putative class members were "injured in precisely the same way." App. at 49a (Compl. ¶ 5).

But Article III does not permit a plaintiff, even one trying to certify a class action, to avoid pleading an actual injury-in-fact. This Court has previously recognized the threat that an unchecked class action device can pose. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). That is particularly concerning when the statute at issue, as RESPA does, permits the trebling of damages and an award of attorneys' fees.[17] In the words of Judge Friendly, the class action device alone can at times result in "blackmail settlements," where even defendants with meritorious defenses feel compelled to settle based on the enormous threat of liability a class action can present. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)). Expanding the ability to pursue class claims in federal court by altering the traditional injury-in-

---

[17] For Section 8 violations, RESPA provides:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

12 U.S.C. § 2607(d)(2); *see also* 12 U.S.C. § 2607(d)(5) (permitting the award of costs and attorneys' fees).

fact requirement for plaintiffs will simply make this practice more prevalent.

Class actions, of course, have a proper and important role to play in our judicial process. However, permitting them (or any litigation in federal court) to proceed even without the important limitations of Article III's standing requirements, is not what Congress or the framers of our Constitution envisioned.

That does not mean that violators of RESPA will escape scrutiny. First, those actually suffering an injury-in-fact may pursue claims. Second, HUD and state regulators have been empowered to enforce RESPA restrictions to prevent violations of RESPA, and frequently do so. *See* 12 U.S.C. § 2607(d)(4); *see also, e.g.*, *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1009 (9th Cir. 2002) ("HUD is the administrative agency charged with enforcing RESPA."); U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: RESPA SETTLEMENT AGREEMENTS, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/resetagr (last visited Aug. 26, 2011) (identifying twenty-five RESPA settlement agreements from 2006 to present). As of July 21, 2011, the Bureau of Consumer Financial Protection, created by the Dodd-Frank Act, can enforce RESPA and has even greater powers to do so. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, §§ 1011(a), 1012(a)(10), 1002(12)(m), 1061-62 (2010). Third, state laws also regulate settlement services conduct and are not preempted by RESPA. *See, e.g.*, *First Fed. Sav. & Loan Ass'n v. Greenwald*, 591 F.2d 417,

420 & n.5 (1st Cir. 1979) (noting that "any state law with respect to settlement practices" that is not inconsistent with RESPA is not preempted by it) (*citing* 12 U.S.C. § 2616). Thus, there is no need to allow private enforcement of RESPA when no traditional injury-in-fact has been alleged, much less incurred.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

August 29, 2011

MICHAEL D. LEFFEL
CONNOR A. SABATINO
FOLEY & LARDNER LLP
Verex Plaza
150 East Gilman Street
Madison, WI 53703
608.257-5035

JAY N. VARON
Counsel of Record
JENNIFER KEAS
FOLEY & LARDNER LLP
3000 K Street, N.W.
Washington, D.C. 20007
202.672.5300
jvaron@foley.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

FILED
OCT 18 2011
OFFICE OF THE CLERK

No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF REPORTER AND ADVISERS TO RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8576
dlaycock@virginia.edu
Counsel of Record

TABLE OF CONTENTS

Interest of the Amici 1

Summary of Argument 2

Argument 4

I. A Plaintiff With a Claim in Restitution and Unjust Enrichment Has Standing to Sue in Federal Court 4

A. The Law of Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss. 4

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Proof of Compensable Injury to Plaintiff 6

1. Two General Points About the Examples That Follow 7

a. The relationship between injury in fact and compensable injury 7

b. Fiduciary duty does not explain these cases 8

2. Familiar Claims in Restitution and Unjust Enrichment Without Compensable Injury to Plaintiff 10

a. Commercial bribes and kickbacks 10

b. Business opportunities. 12

c. Other conflicts of interest. 13

d. Disgorgement of fees 15

e. Infringement of intellectual property. 16

f. Harmless but profitable trespasses. ... 18

g. Harmless but profitable conversions. . 20
h. Rescission. 20
i. Misuse of confidential information 21
j. The slayer rule. 22
C. These Causes of Action for Plaintiffs Who Suffered No Compensable Injury Long Predate the American Founding. 23
D. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks. 26
1. Standing in Suits for Damages and Injunctions 26
2. Standing in Suits for Restitution and Unjust Enrichment 28
II. Petitioners' Argument Would Disrupt or Overturn Large Bodies of Long Established Law with Respect to Unjust Enrichment 31
Conclusion 35
Appendix A-1

TABLE OF AUTHORITIES

Cases

Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) 16

Ciszek v. Kootenai County Board of Commissioners, 254 P.3d 24 (Idaho 2011) 34

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 26

Coleman v. Miller, 307 U.S. 433 (1939) 24

Continental Management, Inc. v. United States, 527 F.2d 613 (Ct. Cl. 1975) 11

Corboy v. Louie, 2011 WL 1687364 (Haw. 2011) 34

Diamond v. Oreamuno, 248 N.E.2d 910 (N.Y. 1969) 22

Edwards v. Lee's Administrator, 96 S.W.2d 1028 (Ky. 1936) 19

Ex parte Lacey, 31 Eng. Rep. 1228 (Ch. 1802) 25-26

Frenchman-Cambridge Irrigation District v. Department of Natural Resources, 801 N.W.2d 253 (Neb. 2011) 34

Fuchs v. Bidwill, 359 N.E.2d 158 (Ill. 1976) 31

Gollust v. Mendell, 502 U.S. 115 (1991) 29-30

Grayson v. AT&T Corp., 15 A.3d 219 (D.C. 2011) 34

Heffernan v. Missoula City Council, 255 P.3d 80 (Mont. 2011) 34

In re Custody of D.T.R., 796 N.W.2d 509 (Minn. 2011) 34

Jackson v. Smith, 254 U.S. 586 (1921) 8, 14, 32

Keech v. Sanford, 25 Eng. Rep. 223 (Ch. 1726) 12, 24

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 27-28

Lum v. Clark, 57 N.W. 662 (Minn. 1894) 11

Lum v. McEwen, 57 N.W. 662 (Minn. 1894) 11

Maier Brewing Co. v. Fleischmann Distilling Corp.,
390 F.2d 117 (9th Cir. 1968) 17

MedImmune, Inc. v. Genentech, Inc.,
549 U.S. 118 (2007) 27

Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928) 13

Mishawaka Rubber & Woolen Mfg. Co. v.
S.S. Kresge Co., 316 U.S. 203 (1942) 18

Mobil Oil Exploration & Producing Southeast, Inc.
v. United States, 530 U.S. 604 (2000) 20-21

Mosser v. Darrow, 341 U.S. 267 (1951) 14, 32

Olwell v. Nye & Nissen Co.,
173 P.2d 652 (Wash. 1946) 8, 20

Patuxent Riverkeeper v. Maryland Department
of Environment, 2011 WL 4502141 (Md. 2011) .. 34

Raven Red Ash Coal Co. v. Ball,
39 S.E.2d 231 (Va. 1946) 18-19

San Juan Agricultural Water Users Ass'n v.
KNME-TV, 257 P.3d 884, 893-94 (N.M. 2011) 34

SEC v. Warde, 151 F.3d 42 (2d Cir. 1999) 22

Sheldon v. Metro-Goldwyn Pictures Corp.,
309 U.S. 390 (1940) 17-18

Slay v. Burnett Trust, 187 S.W.2d 377 (Tex. 1945) .. 15

Snepp v. United States, 444 U.S. 507 (1980) 21-22

Summers v. Earth Island Institute,
129 S. Ct. 1142 (2009) 26-27

Tarnowski v. Resop,
51 N.W.2d 801 (Minn. 1952) 11

Three Boys Music Corp. v. Bolton,
212 F.3d 477 (9th Cir. 2000) 6, 17

United States v. Carter, 217 U.S. 286 (1910) 11

United States v. Podell, 572 F.2d 31 (2d Cir. 1978) . 11

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) 24

Ward v. Taggart, 336 P.2d 534 (Cal. 1959) 32-33

Warth v. Seldin, 422 U.S. 490 (1975) 27

Whelpdale v. Cookson,
27 Eng. Rep. 856 (Ch. 1747) 24-25

Whelpdale v. Cookson,
28 Eng. Rep. 440 (Ch. 1747) 24-25

Constitutions and Statutes

U.S. Const., Art. III 3, 9, 27, 29

Copyright Act,

generally 6

15 U.S.C. §504(b) (2006) 16

Lanham Act, 15 U.S.C. §1117(a) (2006) 16

Patent Act,

35 U.S.C. §284 (2006) 16

35 U.S.C. §289 (2006) 16

Securities & Exchange Act,
15 U.S.C. §78p(b) (2006) 29

Uniform Trade Secrets Act 16, 22

Secondary Authorities

American Law Institute,
Principles of Corporate Governance (1992)

Section 5.04 ..... 15, 22

Section 5.05 13

Section 5.12 13

American Law Institute,
Restatement (Third) of Agency (2006)

Section 8.01 ..... 13, 15

Section 8.02 ..... 11, 13

American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000) 15

American Law Institute,
Restatement of Restitution (1937) 5

American Law Institute,
Restatement (Second) of Restitution (1983) 5

American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011)

generally 1, 36-37

Section 1 ..... 5-6, 30

Section 3 5-6

Section 4 24

Section 13 21

Section 37 20
Section 40 18-20
Section 42 17
Section 43 ..... 8-14, 22
Section 44 11
Section 45 ..... 22-23, 30
Section 51 ..... 9, 32

Dan B. Dobbs, *Law of Remedies: Damages – Equity – Restitution* (2d ed. 1993) 4

Dan B. Dobbs, *Law of Torts* (2000) 18

Douglas Laycock, *Modern American Remedies: Cases and Materials* (4th ed. 2010) 4

George E. Palmer, *The Law of Restitution* (1978) 4

Doug Rendleman & Caprice Roberts, *Remedies: Cases and Materials* (8th ed. 2011) 4

INTEREST OF AMICI

Amici are the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*, law professors and practicing lawyers who served as Advisers or on the Members Consultative Group to that *Restatement*, and law professors who study and publish on the law of restitution. Individual amici are further identified in the Appendix.[1]

The law of restitution and unjust enrichment is central to this case. Petitioners' theory of standing proceeds in disregard of long established doctrines in the law of restitution and unjust enrichment. Respondent's brief, by contrast, is squarely based on the law of restitution and unjust enrichment, but respondent does not appear to be fully aware of how extensively she relies on that law. The risk is great that in deciding this case, the Court may inadvertently disrupt an important body of law that long predates the American founding and that serves essential functions, especially in private law but in parts of public law as well.

This brief explains the law of restitution and unjust enrichment and how the Court would disrupt that long established law if it were to adopt petitioners' reasoning. These amici take no position

---

[1] This brief was prepared entirely by amici and their counsel. No person other than amici and their counsel made any financial contribution to the preparation or submission of this brief. The consents of the parties are on file with the Clerk.

The American Law Institute speaks only through its *Restatements*, *Principles of the Law*, and similar projects. Each such project is carefully reviewed and formally approved by both its governing Council and its membership. This brief is not a statement of the American Law Institute.

on the underlying statutory claim or on the meaning of the statute.

SUMMARY OF ARGUMENT

Petitioners' argument that there is no standing in this case would wreak havoc with the law of restitution and unjust enrichment, barring many long established causes of action from federal court.

The law of restitution and unjust enrichment is a longstanding part of Anglo-American law. It creates remedies and causes of action that are based on gain to defendant rather than loss to plaintiff. It follows that in appropriate cases, the law of restitution and unjust enrichment may impose liability for unjust enrichment even though plaintiff has no claim for compensatory damages, or no claim for compensatory damages that can be proved at reasonable expense. Such causes of action and remedies were part of English law before the American founding, and they have been part of American law ever since.

Standing necessarily depends on the type of relief sought. A plaintiff may have standing to sue for damages but not standing to sue for an injunction, or vice versa. And similarly, a plaintiff may have standing to sue for restitution of unjust enrichment without having standing to sue for damages or an injunction.

Standing in the law of restitution and unjust enrichment requires the restitution plaintiff to show that he is the source of defendant's enrichment, either in the sense that he suffered a loss that corresponds to defendant's gain, *or* in the sense that defendant's gain was acquired by violating plaintiff's rights.

These rules are deeply embedded in the substantive law of restitution, and only occasionally are they labeled as standing rules. But they serve the same function as standing rules: they confine the right to sue to identifiable individuals with a concrete stake in the litigation.

These standing rules may be reconciled with cases interpreting Article III in either of two ways, and the choice of explanation does not affect the result. First, the violation of plaintiff's rights that leads to defendant's unjust enrichment may be recognized as injury in fact. Alternatively, injury in fact may be dismissed as irrelevant, because the whole focus of the claim is on defendant's gain, not plaintiff's loss. Courts have relied on both explanations.

These amici take no position on any of the statutory issues presented by respondent's claim in this case. The limited grant of certiorari requires the assumption that the statute creates the cause of action recognized by the court of appeals. If this Court were to hold that Congress cannot constitutionally create such a cause of action, the apparent implication would be that no plaintiff has standing to assert any claim in restitution and unjust enrichment without first demonstrating that he could also have sued for compensatory damages. Such a holding would bar many longstanding state-law claims from the diversity jurisdiction and would hold unconstitutional many longstanding federal claims.

ARGUMENT

I. A Plaintiff With a Claim in Restitution and Unjust Enrichment Has Standing to Sue in Federal Court.

A. The Law of Restitution and Unjust Enrichment Is Based on Defendant's Gain, Not Plaintiff's Loss.

Compensatory damages, based on plaintiff's loss, and restitution of unjust enrichment, based on defendant's gain, are fundamentally distinct. Each kind of claim ends in a monetary remedy, but both the remedies and the causes of action have different conceptual bases, different histories, and different measures of recovery.

These differences are long established and utterly uncontroversial. As summarized in the standard American treatises, "[R]estitution is measured by the defendant's gains, not by the plaintiff's losses." 1 Dan B. Dobbs, *Law of Remedies: Damages - Equity - Restitution* §1.1 at 5 (2d ed. 1993). "[I]n the damage action the plaintiff seeks to recover for the harm done to him, whereas in the restitution action he seeks to recover the gain acquired by the defendant through the wrongful act." 1 George E. Palmer, *The Law of Restitution* §2.1 at 51 (1978).[2]

Very often, an unjust gain to defendant will be matched by a corresponding loss to plaintiff. If $100 is misappropriated, or paid by mistake, defendant has gained $100 and plaintiff has lost $100. But

---

[2] *See also, e.g.*, 1 Dobbs at 280, 552, 555; Douglas Laycock, *Modern American Remedies: Cases and Materials* 622-23, 651-52 (4th ed. 2010); Doug Rendleman & Caprice Roberts, *Remedies: Cases and Materials* 473 (8th ed. 2011).

sometimes, plaintiff's loss is smaller than defendant's gain. And sometimes, plaintiff has no loss measurable in dollars at all. But such a plaintiff may still have a claim in restitution and unjust enrichment, because the basis of the claim is defendant's gain, not plaintiff's loss.

The new *Restatement* summarizes the basic principle as its predecessors summarized it: "A person who is unjustly enriched at the expense of another is subject to liability in restitution." *Restatement (Third) of Restitution and Unjust Enrichment* §1 (2011) (hereinafter *Restatement (Third)*).[3] It further explains in the first paragraph of the first Comment:

> While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," *without the need to show that the claimant has suffered a loss*. See §3.

Restatement (Third) §1 cmt. *a* (emphasis added).

Section 3, also closely tracking its predecessors, says simply that "A person is not permitted to profit by his own wrong." The first Comment makes two important points about this principle. First:

> The present section marks one of the cornerstones of the law of restitution and unjust enrichment. The general principle it identifies is the one underlying the

---

[3] Accord, *Restatement (Second) of Restitution* §1 (Tentative Draft No. 1, 1983); *Restatement of Restitution* §1 (1937).

> "disgorgement" remedies in restitution, whereby a claimant potentially recovers more than a provable loss so that the defendant may be stripped of a wrongful gain.

Id. §3 cmt. *a*.

Second, the broad principle that no man may profit by his own wrong "identifies an outlook and an objective, not a cause of action." *Ibid.* "Working rules" that describe specific causes of action come in later sections, where liability for defendant's wrongful profits is generally confined to fiduciary and confidential relationships and to conscious wrongdoers. And some statutes, most notably the Copyright Act, impose liability for unjust enrichment without a showing that a violation was knowing or intentional.[4]

B. Many Familiar Causes of Action for Unjust Enrichment Do Not Require Proof of Compensable Injury to Plaintiff.

Petitioners do not appear to define the "injury" they would require to give a plaintiff standing. But petitioners' working definition appears to be that a plaintiff suing for a past wrong must be eligible to recover compensatory damages. This definition is implicit in petitioners' recurring statements equating injury with compensation in damages, often italicizing the word "compensation." Pet. Br. 17, 24, 35 n.17, 40, 46.

Petitioners' argument is oblivious to the law of restitution and unjust enrichment. Many familiar

---

[4] *See, e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482-83 (9th Cir. 2000) (reviewing opinions on "subconscious" copying from Learned Hand forward).

causes of action can support a restitutionary remedy in which plaintiff recovers defendant's unjust enrichment, without proof of damages or of any compensable injury to plaintiff. Plaintiffs in these cases may have suffered no damages, or, what is the same thing for most practical purposes, may have suffered no damages that can be proved and quantified at reasonable expense. These causes of action and their remedies are available even if it is clear that plaintiff suffered no damages at all in any economic sense. In nearly all of these cases, the key to plaintiff's standing is that defendant enriched himself by violating plaintiff's legally protected rights.

1. Two General Points About the Examples That Follow.

This brief will offer many examples of long established causes of action without compensable injury. In considering these examples, it is important to keep in mind two more general points.

a. The relationship between injury in fact and compensable injury. In nearly all the examples that follow, there was a violation of a legally protected interest of the plaintiff. One way to explain these cases is to say that there was an injury in fact to this protected interest, even though there was no compensable injury. But if that explanation is accepted for all these long established claims in restitution and unjust enrichment, then it is equally available for respondent's claim here. That is, if petitioners explain all the law of restitution and unjust enrichment as involving an injury in fact, then respondent can explain her claim the same way.

The other way to explain these cases is to say,

more simply, that a cause of action in restitution and unjust enrichment is based on defendant's gain, and that injury to the plaintiff is simply irrelevant.

Courts have written these opinions both ways. Some opinions rather clearly say that plaintiff can recover defendant's unjust enrichment without proof of any injury to plaintiff. *See, e.g., Jackson v. Smith*, 254 U.S. 586 (1921). Other opinions rather clearly say that defendant's violation of plaintiff's legal rights is an injury to plaintiff, even though measurable damages appear to be zero. *See, e.g., Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). And of course, many opinions simply apply the law of restitution and do not attend to conceptual underpinnings. The result is the same under either explanation: plaintiff can sue for defendant's unjust enrichment without proof of compensable injury.

b. Fiduciary duty does not explain these cases. Petitioners would apparently confine these cases to fiduciaries. Pet. Br. 33. Respondent replies that Congress can impose some of the duties and liabilities of fiduciaries without imposing all the duties and liabilities of fiduciaries, Resp. Br. 31-32, and that is undoubtedly correct. But there is much more to be said.

First, the duty of loyalty, which originally arose in fiduciary relationships, now applies to other confidential relationships that courts are unwilling to characterize as fully fiduciary. *See Restatement (Third)* §43(a), (b). *See also* Comment *f* ("Confidential relation where defendant not a fiduciary") and reporter's note *f*. Both categories — fiduciary duties and confidential relationships — have expanded over time.

This liability extends also to the unjust enrichment of one who receives a benefit "in consequence of another's breach" of a fiduciary duty or confidential relationship. *Restatement (Third)* §43(c) and cmt. *g*. This brief takes no position on the meaning of the statute at issue in this case. But if that statute makes petitioners liable for gains derived from the misconduct of their affiliate, Tower City, that liability would be entirely parallel to the longstanding law on profits accruing to one person from another person's breach of a fiduciary or confidential relationship.

Second, liability for unjust enrichment without proof of compensable injury to plaintiff is not confined to fiduciary or confidential relationships. We offer examples below of liability for unjust enrichment, without proof of compensable injury, on the part of defendants without the slightest whiff of fiduciary duty or confidential relationship — cases of infringers, trespassers, converters, fraudsters, and contract breachers. The basic category here is fiduciaries *or* conscious wrongdoers. *Restatement (Third)* §51(4).

Third, and more fundamental, petitioners' argument about fiduciary duty goes only to the merits. It does not go to the existence of a constitutional case or controversy. If a trust beneficiary has standing to recover his trustee's unjust enrichment, without evidence of compensable injury to the beneficiary, then there is no Article III barrier to the creation of analogous claims for other plaintiffs to recover unjust enrichment without proof of compensable injury.

Article III authorizes jurisdiction over various

categories of "Cases" and "Controversies." It does *not* say "cases, controversies, and claims against fiduciaries." Plaintiffs can sue fiduciaries in unjust enrichment without proof of compensable injury *because* such claims present a case or controversy — *not* because there is something constitutionally special about fiduciaries.

2. Familiar Claims in Restitution and Unjust Enrichment Without Compensable Injury to Plaintiff.

We turn now to illustrations of liability in unjust enrichment without compensable injury to plaintiff.

a. Commercial bribes and kickbacks. Prominent among these restitutionary claims to defendant's profits are the cases on which Congress appears to have modeled the cause of action in this case — claims arising from commercial bribes and kickbacks. What respondent accurately describes as the "no-further-inquiry rule," Resp. Br. 21-38, is enforced by causes of action that are more broadly classified as claims in restitution and unjust enrichment.

An employer can recover any bribe or kickback paid to his employee, without proof that the quality of the employee's services or the terms of any transaction were actually affected by the bribe or kickback. The rule is the same for a client who is entitled to honest and loyal services from a professional or a service provider. If seller bribes a buyer's agent to buy from seller, the agent's employer can recover the amount of the bribe even if the sales were at the market price and there is no evidence of any injury to the buyer. *Restatement (Third)* §43 illus.

17-19 & reporter's note *d* (collecting cases); *id.* §44 illus. 9 & reporter's note *b*; *Restatement (Third) of Agency* §8.02 and cmt. *b* (2006) ("it is not necessary that the principal show that the agent's acquisition of a material benefit harmed the principal.")

As the Minnesota court explained:

> It matters not that the principal has suffered no damage or even that the transaction has been profitable to him. . . .
>
> "Actual injury is not the principle the law proceeds on, in holding such transactions void. Fidelity in the agent is what is aimed at, and, as a means of securing it, the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. . . . It is not material that no actual injury to the company (principal) resulted, or that the policy recommended may have been for its best interest."

Tarnowski v. Resop, 51 N.W.2d 801, 803 (Minn. 1952), quoting *Lum v. McEwen* (*Lum v. Clark*), 57 N.W. 662, 662-63 (Minn. 1894).

These causes of action are an important tool in the fight against government corruption, and governments, including the United States, are frequent plaintiffs in such cases. *See, e.g.*, *United States v. Carter*, 217 U.S. 286, 305-09 (1910) (quoted at Resp. Br. 26); *United States v. Podell*, 572 F.2d 31, 34-35 (2d Cir. 1978); *Continental Management, Inc. v. United States*, 527 F.2d 613, 615-17 (Ct. Cl. 1975) (holding that government can recover the bribe from the briber, instead of the bribee, and collecting cases).

b. Business opportunities. Another example, with ancient roots, is trustees or agents who take for themselves business opportunities that might have been of interest to their beneficiaries or principals.

This body of law begins at least as early as *Keech v. Sanford*, 25 Eng. Rep. 223 (Ch. 1726), briefly described at Resp. Br. 21. A landlord refused to renew a lease to a trust for a minor, and instead leased the property to the trustee individually. "[T]here was clear proof of the refusal to renew for the benefit of the infant," *id.* at 223, and the Lord Chancellor did not doubt the fact. So the beneficiary of the trust had not lost the lease due to any action by the trustee.

The beneficiary had suffered no injury in fact unless the impairment of the trustee's undivided loyalty and the risk that harm *might* have ensued counts as injury in fact. But the Lord Chancellor said that the absence of harm could not change the result: "it is very proper that rule should be strictly pursued, and not in the least relaxed." *Ibid.* Note too that the Chancellor treated this decision as an application of an already settled rule. For modern variations on *Keech v. Sanford*, see *Restatement (Third)* §43 illus. 1 and reporter's note *b*.

From these beginnings, there has grown the whole modern law of corporate opportunities. Partners, directors, officers, agents, and the like cannot take for themselves a business opportunity that might have been of interest to their principal. If they do so, they are liable to the principal for all their profits from the opportunity. The plaintiff need not show that it would have invested in the opportunity itself, and therefore, it need not show that it suffered any compensable injury. *Restatement (Third)* §43 illus. 14-15 and

reporter's note *d*; American Law Institute, *Principles of Corporate Governance* §§ 5.05, 5.12 (1992) and reporter's notes; *Restatement (Third) of Agency* §8.02 and cmt. *d*.

A famous illustration is Justice Cardozo's opinion in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928). The opportunity there was to take a lease on a much larger tract, for a much longer term, requiring much more capital, than the original lease in the joint venture between the parties. *Id.* at 545-46. But it was not for defendant to decide whether his joint adventurer would have been willing and able to participate. "No answer is it to say that the chance would have been of little value even if seasonably offered." *Id.* at 547. One who improperly takes a business opportunity for himself is liable for his profits, whether or not the victim suffered compensable injury.

c. Other conflicts of interest. The rule that applies to bribes and kickbacks and to corporate opportunities applies with equal rigor to other transactions conducted under the potential influence of a conflict of interest. The principal or beneficiary in such a case can sue to recover the unjust enrichment of his agent or trustee without proof of compensable injury. Or, he can sue to rescind or set aside the transaction without proof of either compensable injury to plaintiff or any gain to defendant. *Restatement (Third) of Agency* §8.01 cmt. *d*(1) and reporter's note *d*(1) (summarizing both remedies).

Thus, it is a settled rule, once again with ancient roots, that a receiver or trustee of the assets of an insolvent debtor cannot buy at his own sale, even if the sale is conducted at a public auction and the

trustee is the high bidder. Resp. Br. 21-25; *Restatement (Third)* §43 illus. 20 & reporter's note *d*.

Respondent cites many cases illustrating this rule, including several from this Court. Another revealing example in this Court is *Jackson v. Smith*, 254 U.S. 586 (1921). In *Jackson*, "it affirmatively appear[ed] that the sale was fairly conducted, that there was competitive bidding, and that the property was finally knocked down to the highest bidder." *Id.* at 587. But this high bidder was a group that included the trustee responsible for conducting the sale, and the group went on to make profits with the property it had purchased. The Court unanimously held that the trustee and his confederates were liable "for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not have been injured thereby*." *Id.* at 589 (emphasis added).

Another striking example is *Mosser v. Darrow*, 341 U.S. 267 (1951). There, the *employees* of a reorganization trustee traded in the securities of the enterprise undergoing reorganization. The trustee who employed them and allowed them to trade was held personally liable for their profits, although he had not traded for his own account and had no improper profits of his own. The trustee argued that his employees had caused no loss, and even that their purchases of securities had supported the price and been beneficial to the reorganizing enterprise. *Id.* at 272. The Court was not so sure of that, but its fundamental holding was the now familiar point that it did not matter. *Id.* at 273. The plaintiff could recover the profits of a conflicted transaction, without regard to whether he had suffered any compensable

injury.

Another variation arises when an agent or trustee borrows, formally or informally, assets of the principal or of the trust, and uses those assets to profit personally. The borrower is liable for his personal profits no matter how clear it may be that no harm was done. A clear example is *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustees borrowed money from the trust to invest personally in a speculative venture. They gave an interest-bearing note secured by deeds of trust on real property and oil and gas interests, *id.* at 385, and they had repaid most of the loan by the time of trial, *id.* at 387. Almost certainly the speculative investment would have been inappropriate for the trust. But the trustees were liable to the trust for the profits on the speculative investment, because they had improperly used trust assets to make the profit. *Id.* at 387-89.

Similarly if a corporate officer uses any of the corporation's property for his own benefit, he is liable to the corporation for any resulting profit or benefit. American Law Institute, *Principles of Corporate Governance* §5.04(a), (c) (1992).

d. Disgorgement of fees. An agent, attorney, or other fiduciary who breaches a duty of loyalty may forfeit fees to which he would otherwise be entitled. *Restatement (Third) of Agency* §8.01 cmt. *d*(2) (2006); *Restatement (Third) of the Law Governing Lawyers* §37 (2000). If he has already collected those fees, the client may sue to recover them. *Id.* cmt. *a*. The fiduciary would be unjustly enriched if he retained fees that he had forfeited by his disloyalty.

When the client sues to recover all or an allocable

portion of the fees, he need not show that the disloyal act caused compensable injury. *See, e.g., Burrow v. Arce*, 997 S.W.3d 229, 237-40 (Tex. 1999); *see id.* at 239 nn.36-37 (collecting authorities).

This rule too appears to have been part of the model for the statutory cause of action in this case. Liability is triggered by a bribe or kickback, but the measure of recovery is based on the fees paid, perhaps because that amount is fully known to customers and therefore easier to prove.

e. Infringement of intellectual property. Examples far removed from fiduciary duty arise in the law of intellectual property. One who infringes the intellectual property of another is generally liable for either his own profits or the victim's losses. 17 U.S.C. §504(b) (copyright); 15 U.S.C. §1117(a) (2006) (trademark); Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005) (trade secret). Liability for profits has been repealed in patent infringement, except for design patents, 35 U.S.C. §§ 284, 289 (2006), for policy reasons having nothing whatever to do with standing or the existence of cases and controversies.

If the infringer takes sales away from the victim of infringement, plaintiff will have losses and defendant will have gains that may be either more or less than plaintiff's damages. Plaintiff can generally sue for whichever is larger.

It not infrequently happens that the infringer expands the market, or creates a derivative work that is infringing but not duplicative, so that the infringer has substantial profits from infringing sales, but the plaintiff has no lost sales and no damages. In such a

case, plaintiff can recover defendant's profits without proof of any compensable injury. *Restatement (Third)* §42 illus. 7-9 and reporter's note *g*.

A copyright example is *Three Boys Music Corp. v. Bolton*, 212 F.3d 477 (9th Cir. 2000), where defendant produced a hit song in 1991 that infringed another hit from 1964. The infringer was liable for the portion of his profits attributable to the infringement, estimated by the jury at 18%.[5] But it is hard to imagine that the plaintiff lost any sales of his 1964 song in 1991.

A leading trademark example is *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117 (9th Cir. 1968), where the maker of an inexpensive beer copied the trademark of a well known scotch whisky. The infringer profited from his deliberate infringement, but plaintiff did not claim that it had lost any sales of whisky. Defendants plausibly argued that plaintiffs had shown "no injury to themselves, no diversion of sales from them to the appellants, no direct competition from which injury may be inferable." *Id.* at 120.

The leading case in this Court is *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), where MGM plagiarized the script of a play and made a major movie. Damages to the copyright holder might have been zero, and were at most quite modest

---

[5] The infringing song was sold on an album. The jury attributed 28% of the profits of the album to the infringing song, and 66% of the profits of that song to the infringement. 212 F.3d at 487. The net result was that 28% of 66%, or 18.48% of the profits of the album, were attributable to the infringement. Such estimates are unavoidable in copyright litigation, and were approved by this Court in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940).

compared to the profits from the movie. The Court affirmed a judgment for 20% of the profits from the movie, based on the lower court's estimate of the highest proportion of the profits that might possibly have been attributable to the plagiarized script. *Id.* at 408-09.

The rule allowing recovery of the infringer's profits is sufficiently settled that although this Court decides many intellectual property cases, it has not returned in recent years to issues of how to measure the infringer's profits. Numerous earlier cases are cited in *Sheldon*. *See also Mishawaka Rubber & Woolen Manufacturing Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942), awarding a trademark infringer's profits.

f. Harmless but profitable trespasses. A trespasser is liable for compensatory damages, for nominal damages in the absence of any actual damage,[6] or for the profits of the trespass, *Restatement (Third)* §40.

There are well known examples in which the trespass was harmless, because plaintiff was not using his land or was not even capable of using his land. But he could still sue for the profits of a substantial commercial trespass. In *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), defendant had an easement to build a railroad across plaintiff's land and to transport on that railroad coal mined from specified tracts of land. Without authorization, defendant also transported coal mined from additional tracts. Defendant argued that the only remedy should be nominal damages for the tort. The

---

[6] Dan B. Dobbs, *The Law of Torts* § 50 at 97 (2000).

Virginia court disagreed, awarding instead the value of the benefit wrongfully acquired:

> The illegal transportation of the coal in question across plaintiff's land was intentional, deliberate and repeated from time to time for a period of years. . . . To limit plaintiff to the recovery of nominal damages for the repeated trespasses will enable defendant, as a trespasser, to obtain a more favorable position than a party contracting for the same right. Natural justice plainly requires the law to imply a promise to pay a fair value of the benefits received. Defendant's estate has been enhanced by just this much.

Id. at 238; *Restatement (Third)* §40 illus. 2.

Another well known example is *Edwards v. Lee's Administrator*, 96 S.W.2d 1028 (Ky. 1936); *Restatement (Third)* §40 illus. 4, §51 illus. 13. Edwards, who owned the mouth of the Great Onyx Cave, developed and exploited the entire cave as a tourist attraction. About one-third of the cave was Lee's property — 360 feet below the surface and inaccessible to Lee. 96 S.W.2d at 1030. The court did not find any compensatory damages; instead, it awarded one-third of the profits from the cave to Lee. "[W]e are led inevitably to the conclusion that the measure of recovery in this case must be the benefits, or net profits, received by appellants from the use of the property of the appellees." 96 S.W.2d at 1032. Reviewing similar rules in a range of factual contexts, the court said that "The philosophy of all these decisions is that a wrongdoer shall not be permitted to make a profit from his own wrong." *Ibid.*

g. Harmless but profitable conversions. Similar facts can arise in conversion. A well known example is *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946). Defendant "borrowed" the plaintiff's egg-washing machine, without authorization, and used it in his business for more than three years until discovered. Plaintiff had stored the machine in a space adjacent to defendant's business site, had no current use for it, and did not know that defendant was using it. Defendant plausibly argued that plaintiff had suffered no loss.

The court said that plaintiff had suffered a loss, at least in the abstract, but the remedy it affirmed was a judgment for defendant's profits from using the machine. "To hold otherwise would be subversive of all property rights since his use was admittedly wrongful and without claim of right. The theory of unjust enrichment is applicable in such a case." *Id.* at 654; *Restatement (Third)* §40 illus. 17.

h. Rescission. Rescission of transactions is another familiar restitutionary remedy that need not be accompanied by compensable injury. If one party to a contract commits a material breach, by repudiation or substantial failure to perform, the other party is entitled to get his money back, even if performance would have been worthless and contract damages would have been zero. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000); *Restatement (Third)* §37 illus. 1. After reviewing the underlying principles, *id.* at 607-08, and resolving various preliminary issues, the Court turned to the facts. The government convincingly argued that Mobil had suffered no damages, but the Court said that did not matter.

> This argument, however, misses the basic legal point. The oil companies do not seek damages for breach of contract. They seek restitution of their initial payments. Because the Government repudiated the lease contracts, the law entitles the companies to that restitution whether the contracts would, or would not, ultimately have produced a financial gain or led them to obtain a definite right to explore. If a lottery operator fails to deliver a purchased ticket, the purchaser can get his money back — whether or not he eventually would have won the lottery.

Id. at 623-24.

The rule is the same when a transaction is rescinded for fraud. "Rescission of a transfer induced by fraud or material misrepresentation requires no showing either that the transferor has suffered economic injury (the requirement in tort) or that the transferee has realized a benefit at the transferor's expense (the standard condition of unjust enrichment)." *Restatement (Third)* §13 cmt. *e*; *see* illus. 7-9 and reporter's note *e*. If plaintiff has been deceived on a point that matters to him, he can undo the transaction, whether or not the point of the deception has a value measurable in dollars.

i. **Misuse of confidential information.** A person who misuses confidential information is liable for any profits he makes as a result — whether or not the person entitled to control the information suffers a compensable injury. An example in this Court is *Snepp v. United States*, 444 U.S. 507 (1980), where a CIA agent published a book about his work without submitting the manuscript for review by the agency.

The government made no effort to prove damages. The Court believed the government had been harmed but that any damages were "unquantifiable." *Id.* at 514. The Court granted a constructive trust over all proceeds of the book.

The rule is the same in more prosaic contexts such as trade secrets. One who misappropriates a trade secret is liable for his profits, whether or not plaintiff proves any damages. Uniform Trade Secrets Act §3(a), 14 Unif. Laws Ann. 633 (2005).

The whole civil law of insider trading depends on this rule. When the insider uses corporate information to profit by trading in the corporation's securities, the corporation can recover those profits without pleading or proving any compensable injury to the corporation. *Restatement (Third)* §43 illus. 9 and reporter's note *c*; American Law Institute, *Principles of Corporate Governance* §5.04(a), (c) (1992); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969). The cause of action is to recover defendant's profits, *see, e.g.*, *SEC v. Warde*, 151 F.3d 42, 49-50 (2d Cir. 1998), and it is probably rare in such cases for the corporation to have any compensable injury.

j. The slayer rule. If a person in position to inherit property on the death of another feloniously kills that other person, the slayer does not get to keep the property he inherits. *Restatement (Third)* §45. The rule is the same if the slayer would acquire the property through life insurance, joint tenancy with right of survivorship, or any other means by which property passes at death. *Ibid.*

The property passes instead to the person next in

line, usually the person who would have inherited the property if the slayer had predeceased the victim. §45(3). Very often, that person has no compensable injury, and no legally protected interest, under the wrongful death act. The person who inherits in lieu of the slayer may be an adult child of the victim, a sibling, a nephew, or a first cousin once removed. If that person was not financially dependent on the victim, and not on the short list of other potential plaintiffs listed in the wrongful death acts of some states, he cannot sue for wrongful death.

It is unimaginable that this body of law would be held unconstitutional and stricken from the books. Yet the cause of action is vested in a person — the substitute heir or beneficiary — who may have no compensable injury and no legally protected interest. The cause of action is vested in the most appropriate plaintiff, and that plaintiff has a clear personal stake in the litigation.

* * * * *

The point of all these examples is that plaintiffs who suffered no compensable injury can often sue to recover or prevent a defendant's unjust enrichment. Large, diverse, and important areas of law would be thrown into confusion by an opinion suggesting that an unjust enrichment plaintiff must show injury in fact and that injury in fact may be equated with compensable injury or economic loss.

C. These Causes of Action for Plaintiffs Who Suffered No Compensable Injury Long Predate the American Founding.

The law of restitution and unjust enrichment has ancient roots. It developed independently in the

courts of equity and in the courts of common law before the American founding. These cases were part of "the traditional concern of the courts at Westminster." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.)). The history is briefly reviewed in the comments and reporter's notes to *Restatement (Third)* §4.

Respondent offers an accurate account of some of the pre-founding and founding-era cases. Resp. Br. 21-23. These are cases in which the Chancellor granted an accounting of profits — an order that defendant account for any profits wrongfully earned and pay those profits over to the plaintiff — even though plaintiff proved no damages and appears to have suffered no compensable injury. In addition, conflicted transactions were set aside, whether or not plaintiff had any damages or defendant had any profits. We have already described *Keech v. Sanford*, *supra* at 12, in which the Lord Chancellor awarded an accounting of a trustee's profits from a lease even though the landlord had expressly refused to renew the lease with the trust as a tenant. That was in 1726, and the core of the rule appears to have already been settled.

The other early cases cited by respondent are equally clear. The trustee in *Whelpdale v. Cookson*, 27 Eng. Rep. 856 (Ch. 1747), cited at Resp. Br. 21, was the highest bidder at a public sale, but suit lay to set aside the sale on the ground that the trustee had acted both as buyer and seller. The facts are more fully stated in *Whelpdale v. Cookson*, 28 Eng. Rep. 440 (Ch. 1747), where the reporter of decisions says

that "The doctrine is not confined to Trustees, but extends to Assignees under Commissions of Bankrupt, Solicitors, Agents, and in short all persons having a confidential character," citing numerous cases. *Id.* at 441.

The reporter there also notes that the authority of *Whelpdale* had "been doubted" by Lord Eldon in *Ex parte Lacey*, 31 Eng. Rep. 1228, 1229, 6 Vesey Jr. 626, 628 (Ch. 1802). Lord Eldon's "doubt" was that *Whelpdale* had not gone far enough. The Lord Chancellor in *Whelpdale* had said that a majority of the creditors could ratify a sale to a bankruptcy trustee who bought at his own sale. But Lord Eldon insisted in *Lacey* that the majority could not waive the rights of the minority, and that only unanimous consent by all the creditors could ratify such a sale.

There were many of these cases in early modern England, as indicated in Resp. Br. 21-23 & n.4, and in the discussion and citations in the opinions. The Chancellors discuss these cases as a recurring problem. They insist that neither harm to plaintiff nor gain to defendant need be proved; there is a cause of action to set aside the sales because the temptation to abuse is ever present, and whether there is actual injury or gain is too difficult to determine. As Lord Eldon explained:

> [The rule] is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.

Ex parte Lacey, 31 Eng. Rep. at 1229.

So the courts dispensed with proof of loss to plaintiff; they dispensed even with proof of gain to defendant. It was enough to support a cause of action that there was a duty of loyalty and a temptation to profit at the plaintiff's expense.

D. The Requirements of Standing Necessarily Depend on the Relief Plaintiff Seeks.

1. Standing in Suits for Damages and Injunctions.

A plaintiff must show "that he has standing for each type of relief sought." *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009), citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983). The reason plaintiff must separately show standing for each type of relief sought is that the precise requirements for standing necessarily vary with the type of relief sought. There is no uniform rule of standing that applies without change to every type of relief.

In *Lyons*, this Court acknowledged that plaintiff had standing to sue for compensatory damages but held that he lacked standing to sue for an injunction. Plaintiff had suffered the damages, so he had standing to sue for those, but he was not sufficiently threatened with a repetition to have standing to sue for an injunction.

Many other cases are the reverse. A plaintiff who is threatened with unlawful conduct has standing to sue for an injunction, but he has no standing to sue for damages, because he has not yet suffered any damages. A plaintiff who faces threatened harm has

not suffered injury in fact, but he has standing to sue for an injunction or declaratory judgment because he is threatened with injury in fact that the judgment can prevent. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

In claims for compensatory damages, injury in fact is obvious. The emphasis on injury in fact for standing developed in public-law suits for injunctions or declaratory judgments, where it is necessary to separate those who can appropriately sue to challenge government policies from those who cannot. This purpose is clearly stated in the cases that petitioners rely on most heavily.

In *Summers*, the most recent of these cases, the context was a suit to enjoin implementation of certain rules of the Forest Service. The Court emphasized that standing rules are "founded in concern about the proper — and properly limited — role of the courts in a democratic society." 129 S. Ct. at 1148 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Except where necessary to redress actual or threatened injury, "courts have no charter to review and revise legislative and executive action." 129 S. Ct. at 1148.

It was in this context that the Court said that "injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id.* at 1151. This "hard floor" statement was immediately followed by a statement again focusing attention on the context: "[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's *nonconcrete interest in the proper administration of the laws*." *Ibid.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81

(1992) (Kennedy, J., concurring)) (emphasis added).

This emphasis on concrete injury in fact makes sense in its original context. But plainly, the Court was not thinking about restitution of unjust enrichment in any of these opinions. Restitution of unjust enrichment is a different "type of relief," with different requirements for standing.

2. Standing in Suits for Restitution and Unjust Enrichment.

Just as standing to sue for damages is different from standing to sue for an injunction, so standing to sue for restitution of unjust enrichment is different from either. Because claims for unjust enrichment are based on defendant's gains rather than plaintiff's losses, a focus on compensable injury or economic loss asks the wrong question. Either any requirement of injury must be abandoned in unjust enrichment cases, or else it must be clarified to fit the law of restitution and unjust enrichment.

The basis for standing in claims for restitution of unjust enrichment is that defendant made his profits "at the expense of" plaintiff, *supra* at 5, either in the sense of a corresponding loss to plaintiff and gain to defendant, or in the sense that defendant's profits are derived from a violation of plaintiff's legally protected rights. It matters little whether the Court describes this requirement as a special category of injury in fact or as a distinct requirement that suffices in claims for restitution of unjust enrichment. What is critical is that the Court recognize that claims to restitution of unjust enrichment are different from claims for compensatory damages and different from claims for injunctions, and that standing must be determined in

light of the nature of the claim.

This Court considered the standing question in *Gollust v. Mendell*, 501 U.S. 115 (1991), a decision that petitioners badly misinterpret. Pet. Br. 33. *Gollust* was a suit to recover a corporate insider's short-term trading profits under §16(b) of the Securities and Exchange Act, 15 U.S.C. §78p(b) (2006). The statute authorizes the issuer whose securities are illegally traded to recover these profits, and it authorizes other holders of that issuer's securities to recover the profits on behalf of the issuer if the issuer fails to act. It is unlikely that the issuer suffers any compensable injury when one of its officers or major shareholders buys and sells in a six-month period, and almost unimaginable that an individual holder of its securities suffers compensable injury. But the issuer has standing to sue because its confidential information was misused to produce the trading profits. Its securities holders have standing to sue on the general principles of derivative suits.

Gollust held that a derivative plaintiff in a §16(b) suit must continue to hold his securities in the issuer throughout the litigation. Otherwise, he would not have the necessary "personal stake" in the lawsuit that is essential to Article III standing. 501 U.S. at 125-26.

But the "personal stake" at issue in *Gollust* was *not* a compensable injury or an economic loss. The Court quoted the requirement of "injury" to the plaintiff, *id.* at 126, but there is not the slightest hint in the opinion that any injury to plaintiff was compensable, or that it was anything more than an intentional violation of his legal rights that had been profitable to the violator. Plaintiff's "personal stake"

was that "respondent still stands to profit, albeit indirectly, if this action is successful." *Id.* at 128. "[H]e retains a continuing financial interest in the outcome of the litigation derived from his stock in International's sole stockholder, Viacom, whose only asset is International." *Id.* at 127-28. The decision was unanimous.

To have standing to sue on a restitutionary claim for defendant's wrongful profits, plaintiff had to have a personal stake in *defendant's profits* — not a personal stake in his own non-existent losses. Claims in restitution and unjust enrichment are based on defendant's gains, and standing depends on plaintiff's stake in those gains.

It does not follow that just anybody can create a personal stake by suing to recover a stranger's unjust enrichment. The requirement that defendant's gains be at plaintiff's expense is deeply embedded in the law of restitution. It appears in the black letter of §1 of the *Restatement (Third)*, and in the formulation of nearly every substantive rule of restitution and unjust enrichment. Even in the exceptional case of the slayer rule, careful attention is paid to identifying the appropriate plaintiff entitled to inherit in lieu of the slayer — a choice that is easy in most cases but difficult in a few. *Restatement (Third)* §45(3) & cmt. *d*. Only that plaintiff can sue. Self-appointed plaintiffs without a personal stake cannot sue.

These rules requiring identification of the source of defendant's enrichment, or the appropriate heir in the case of the slayer rule, control who can be a plaintiff. Usually lawyers and judges think of these rules as simply part of the substantive rules of restitution and unjust enrichment — just as in

compensatory damages cases, they are more likely to think of the requirement that plaintiff prove damages as part of his substantive claim than as a standing rule.

But when the wrong plaintiff tries to sue, or when an unusual plaintiff asserts that special circumstances give him the right to sue, then the court may talk about the identity of the restitution plaintiff in terms of standing. An example is *Fuchs v. Bidwill*, 359 N.E.2d 158 (Ill. 1976), where the court held that citizens and taxpayers lacked standing to sue on behalf of the state for restitution of corrupt profits allegedly earned by state legislators. *Id.* at 508-10. The state could have sued, but individual citizens and taxpayers could not.

Standing to sue depends on the "type of relief" sought. The proper rule of standing in claims for restitution of unjust enrichment is that plaintiff have a personal stake in the recovery, and in all but exceptional cases, such as the slayer rule, that defendant's gains were acquired by a violation of plaintiff's legal rights.

II. Petitioners' Argument Would Disrupt or Overturn Large Bodies of Long Established Law with Respect to Unjust Enrichment.

The statutory claim in this case appears to be modeled on common law and equitable claims in restitution and unjust enrichment. Respondent alleges that petitioners paid a bribe to get a flow of business that included her, and that consequently she is entitled to restitution of the fees she paid for their services. A holding that there is no standing here would appear to mean that there is no standing in

many long established causes of action. Certainly petitioners offer no plausible explanation of how their position is consistent with the law of restitution and unjust enrichment.

It is true that respondent's statutory claim goes beyond the traditional boundaries of restitution in some ways. The statute imposes joint and several liability, instead of several liability for the portion of plaintiff's fees retained by each defendant. The law of restitution and unjust enrichment generally imposes only individual liability for each defendant's enrichment, but that is not a universal rule. This Court imposed joint and several liability for the profits of a group in *Jackson v. Smith*, 254 U.S. 586, 589 (1921), citing similar earlier cases. And *Mosser v. Darrow*, 341 U.S. 267 (1951), described *supra* at 14, imposed vicarious liability in unjust enrichment on a defendant who had no personal profits at all — a result that goes well beyond joint and several liability. Whether petitioners' liability is joint and several or only several has nothing to do with respondent's personal stake in the litigation, and nothing to do with whether petitioners' enrichment was at respondent's expense — in short, nothing to do with standing.

The statutory claim also goes beyond a restitution claim by adding a punitive element; petitioners will be liable, if at all, for three times the fees received. But there is nothing unusual about this. It is settled that in appropriate cases, a claim for restitution of unjust enrichment can be combined with a claim for punitive damages, and that plaintiff can recover both. *Restatement (Third)* §51 cmt. *k* and reporter's note *k*; *see, e.g.*, *Ward v. Taggart*, 336 P.2d 534, 538-39 (Cal.

1959) (Traynor, J.). And here too, Congress's decision to combine restitutionary and punitive elements in a single claim has nothing whatever to do with respondent's standing.

The Court must decide this case with careful attention to the vast body of law on restitution and unjust enrichment. Respondent appears to have a personal stake in recovery of fees paid to a service provider that, respondent alleges, collected those fees in a transaction that violated statutory rules designed to protect customers like her. Either the Court must uphold standing to assert that claim, or it must carefully and convincingly distinguish that claim from the many long established claims in unjust enrichment on behalf of plaintiffs who suffered no compensable injury.

An opinion requiring injury in fact, and suggesting that injury in fact requires a compensable injury or an economic loss, would overturn centuries of Anglo-American law. All the cases discussed above (in part I.B.2) would appear to be barred from federal court if this Court were to adopt petitioners' argument. Where a restitution plaintiff can prove compensable injury, the claim could proceed — but requiring such proof in a claim for restitution of unjust enrichment would fundamentally change the lawsuit, adding a previously irrelevant issue to every plaintiff's burden of proof.

Many federal claims would be barred or fundamentally changed — claims to recover bribes paid to federal employees, claims for infringement of copyright, trademark, and design patents, claims to recover the profits of trading on inside information, claims to recover short-term trading profits by

insiders, and more. Many state-law claims would be appear to be barred from the diversity jurisdiction.

Many states have similar standing rules for litigation in state court, often following or visibly influenced by this Court's decisions.[7] Future defendants would argue the persuasive value of this Court's decision in state court; every state would have to decide whether to preserve the traditional rules of restitution and unjust enrichment or to follow this Court's lead and bar many such claims. Of course this Court is not responsible for state law. But the Court should think carefully before it bars many state-law claims from federal court and throws large swathes of state law into potential chaos.

---

[7] *See, e.g. Grayson v. AT&T Corp.*, 15 A.3d 219, 233-35 (D.C. 2011); *Corboy v. Louie*, 2011 WL 1687364, *12-16 (Haw. 2011); *Ciszek v. Kootenai County Board of Commissioners*, 254 P.3d 24, 29-30 (Idaho 2011); *Patuxent Riverkeeper v. Maryland Department of Environment*, 2011 WL 4502141, *1-8 (Md. 2011); *In re Custody of D.T.R.*, 796 N.W.2d 509, 512-13 (Minn. 2011); *Heffernan v. Missoula City Council*, 255 P.3d 80, 91-92 (Mont. 2011); *Frenchman-Cambridge Irrigation District v. Department of Natural Resources*, 801 N.W.2d 253, 258-60 (Neb. 2011); *San Juan Agricultural Water Users Ass'n v. KNME-TV*, 257 P.3d 884, 893-94 (N.M. 2011).

CONCLUSION

The judgment below should be affirmed. And the Court's opinion should take care to preserve the long established law of restitution and unjust enrichment.

Doug Rendleman
Washington & Lee
School of Law
1 Denny Circle
Lexington, VA 24450
540-458-8934
rendlemand@wlu.edu

Douglas Laycock
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
434-243-8576
dlaycock@virginia.edu
Counsel of Record

October 18, 2011

APPENDIX

The following individuals have joined as amici in this brief:

Mark P. Gergen is Professor of Law at the University of California-Berkeley, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and the American Editor of the *Restitution Law Review*.

Andrew Kull is the Austin B. Fletcher Professor of Law at Boston University and the Reporter for the *Restatement (Third) of Restitution and Unjust Enrichment*.

Douglas Laycock is the Robert E. Scott Distinguished Professor of Law at the University of Virginia, Alice McKean Young Regents Chair in Law Emeritus at the University of Texas, Second Vice President of the American Law Institute, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of *Modern American Remedies* (4th ed. 2010).

Colleen P. Murphy is Professor of Law at Roger Williams University and part of the Members Consultative Group to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Phil C. Neal is former Dean of the University of Chicago Law School, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and a partner in Neal, Gerber, & Eisenberg, LLP.

Doug Rendleman is the Huntley Professor of Law at Washington & Lee University, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of Doug Rendleman &

Caprice Roberts, *Remedies* (8th ed. 2011).

Caprice Roberts is Professor of Law at West Virginia University, part of the Members Consultative Group to the *Restatement (Third) of Restitution and Unjust Enrichment*, and editor of Doug Rendleman & Caprice Roberts, *Remedies* (8th ed. 2011).

Chaim Saiman is Associate Professor of Law at Villanova University and has published scholarly articles on restitution and unjust enrichment.

Emily L. Sherwin is Professor of Law at Cornell University and an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*.

Michael Traynor is President Emeritus and Chair of the Council Emeritus of the American Law Institute, an Adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, and Senior Counsel at Cobalt LLP.

AMICUS CURIAE BRIEF

BRIEFS

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF STEWART INFORMATION SERVICES CORPORATION, FIDELITY NATIONAL FINANCIAL, INC., AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GERARD D. KELLY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

PETER D. KEISLER*
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Amicus Curiae Stewart Information Services Corporation

* Counsel of Record

[Additional Counsel Listed On Inside Cover]

August 29, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

JOHN L. KILLEA
PAMELA BUTLER O'BRIEN
STEWART TITLE
GUARANTY COMPANY
1980 Post Oak
Boulevard
Suite 710
Houston, TX 77056
(713) 625-8250
Counsel for Amicus
Curiae Stewart
Information Services
Corporation

MARK E. SCHIFFMAN
CHRISTINE R. MILTON
FIDELITY NATIONAL
FINANCIAL, INC.
601 Riverside Avenue
Building V, 7th Floor
Jacksonville, FL 32204
(904) 854-8901
Counsel for Amicus
Curiae Fidelity National
Financial, Inc.

ELAINE L. LAYTON
OLD REPUBLIC
NATIONAL TITLE
INSURANCE COMPANY
125 Technology Drive
Suite 101
Canonsburg, PA 15317
(724) 746-2777
Counsel for Amicus
Curiae Old Republic
National Title Insurance
Company

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION	3
BACKGROUND ON REGULATION OF THE TITLE INSURANCE INDUSTRY	5
ARGUMENT	9
I. EDWARDS DOES NOT HAVE STANDING BASED UPON A THEORY OF SYSTEMIC ECONOMIC HARM	10
A. Edwards Has Not Pleaded A Claim Of Economic Injury	10
B. Edwards's Theory Of Economic Harm Is Too Speculative To Qualify As An Injury-In-Fact	13
C. Edwards's Theory Of Economic Harm Is Not Traceable To Tower City's Accused Arrangement With First American	17
II. IF ACCEPTED, EDWARDS'S THEORY OF STANDING WOULD FLOOD THE TITLE INSURANCE INDUSTRY WITH MERITLESS LAWSUITS	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Allen v. *Wright*, 468 U.S. 737 (1984) 9, 14, 17, 18
Ariz. Christian Sch. Tuition Org. v. *Winn*, 131 S. Ct. 1436 (2011) 14, 21
ASARCO, Inc. v. *Kadish*, 490 U.S. 605 (1989) 5, 14, 17
Ashcroft v. *Iqbal*, 129 S. Ct. 1937 (2009) 12
AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011) 21
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 12
Crawford-El v. *Britton*, 523 U.S. 574 (1998) 20
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 14
FEC v. *Akins*, 524 U.S. 11 (1998) 18
FTC v. *Ticor Title Ins. Co.*, 504 U.S. 621 (1992) 6
FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 10
German Alliance Ins. Co. v. *Lewis*, 233 U.S. 389 (1914) 6
In re Title Ins. Antitrust Cases, 702 F. Supp. 2d 840 (N.D. Ohio 2010), *appeal docketed sub nom. Katz* v. *Fid. Nat'l Title Ins.*, No. 10-3545 (6th Cir. filed Apr. 30, 2010) 12, 13, 15
Keogh v. *Chi. & Nw. Ry.*, 260 U.S. 156 (1922) 13
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973) 17
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) ..... *passim*

TABLE OF AUTHORITIES—continued

	Page
Massachusetts v. *EPA*, 549 U.S. 497 (2007)	16, 18
Minter v. *Wells Fargo Bank, N.A.*, No. 07-cv-3442 (D. Md. filed Dec. 26, 2007)	20
Morales v. *Attorney's Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997)	13
Prudential Ins. Co. v. *Benjamin*, 328 U.S. 408 (1946)	5, 6
Sierra Club v. *Morton*, 405 U.S. 727 (1972)	16
St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531 (1978)	5
Stoneridge Inv. Partners, LLC v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008)	21
Summers v. *Earth Island Inst.*, 129 S. Ct. 1142 (2009)	16
Toldy v. *Fifth Third Mortgage Co.*, No. 09-cv-377 (N.D. Ohio filed Feb. 18, 2009)	19
United States v. *Se. Underwriters Ass'n*, 322 U.S. 533 (1944), *superseded by statute*, McCarron-Ferguson Act, ch. 20, 59 Stat. 33 (1945), *as recognized in U.S. Dep't of Treasury* v. *Fabe*, 508 U.S. 491 (1993)	6
Warth v. *Seldin*, 422 U.S. 490 (1975)	4, 10, 14

STATUTES AND REGULATIONS

Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4	21
12 U.S.C. § 2601 *et seq.*	2
§ 2602(7)	20
§ 2607(c)(4)	20
15 U.S.C. §§ 1011 *et seq.*	6
§ 1011	9

TABLE OF AUTHORITIES—continued

	Page
15 U.S.C. § 1012(b)	6, 12
Alaska Stat. § 21.66.410(c)	9
Del. Code Ann. tit. 18, § 2526	9
N.J. Stat. Ann. § 17:46B-41	9
N.Y. Ins. Law § 2313(o)	9
§ 6409	9
Ohio Rev. Code Ann. § 3935.03	4, 7, 14, 15
§ 3935.04	7, 14
§ 3935.05	8, 15
§ 3935.06	7, 14
§ 3953.05	7
24 C.F.R. § 3500.14(g)(2)	20
HUD Statement of Policy 1996-2, 61 Fed. Reg. 29,258 (June 7, 1996)	20

LEGISLATIVE HISTORY

S. Rep. No. 93-866 (1974)	19
S. Rep. No. 109-14 (2005)	21

SCHOLARLY AUTHORITIES

Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 Mich. L. Rev. 545 (1958)	5, 6, 7
Palomar, *Title Insurance Law* (2010)	19
Rosenberg, *Historical Perspective of the Development of Rate Regulation of Title Insurance*, 44 J. of Risk & Ins. 193 (1977)	7

OTHER AUTHORITIES

Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey* (2011)	2

TABLE OF AUTHORITIES—continued

Page

Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* (2010) 2

Martin & Ludwick, CapAnalysis Group, LLP, *Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs: An Economic Analysis* (2006), *available at* http://www.respro.org/docs/CAP%20RESPRO%20Study%20(2).pdf. 20

Nat'l Ass'n of Ins. Comm'rs, *Survey of State Insurance Laws Regarding Title Data and Title Matters* (2010), *available at* http://www.naic.org/documents/committees_c_title_tf_survey_state_laws.pdf. 8, 9

INTEREST OF *AMICI CURIAE*[1]

Amici curiae have a substantial and direct interest in this case because they are three of the nation's four largest title insurers, with Petitioner First American Financial Corporation being the fourth.

Stewart Information Services Corporation and its predecessors have been in the title insurance business since 1893. Today, Stewart is a technology-driven, strategically competitive real estate information and transaction management company. It provides title insurance through a network of 8,500 offices and agencies around the United States and abroad.

Fidelity National Financial, Inc., is the largest title insurance company in the United States. It is also a leading provider of other services for real estate transactions, such as escrow. During 2008, Fidelity's title insurance companies held a 45.7% share of the U.S. title insurance market. Fidelity's customers are served by over 1,600 direct residential title offices and nearly 7,500 agents.

Old Republic National Title Insurance Company traces its beginnings to the early 1900s. Its parent company, Old Republic International Corporation, is now one of the nation's largest shareholder-owned insurance businesses. Old Republic's title insurance

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certify that counsel of record for both Petitioners and Respondent have consented to this filing in letters on file with the Clerk's office.

services are sold through a network of 242 company offices and nearly 10,000 title agents.

Amici sell title insurance throughout the United States and have a variety of ownership interests in, and preferential arrangements with, title agencies. In 2010, almost a quarter of all title premiums—nearly $2.3 billion—were paid for policies issued through title agencies that were affiliated with the insurer. See Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* 7 (2010). These interests and arrangements are commonplace, lawful, beneficial to purchasers of settlement services, and well known to state and federal regulators.

Further, these interests and arrangements can be vital to small, often family-owned title agencies. Nearly 60% of all title agencies have five or fewer employees, and over half generate less than $500,000 annually in gross revenues. See Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey* 7, 9 (2011). These small businesses typically have limited cash reserves. They depend on outside capital both to survive major life-cycle events (*e.g.*, death, retirement, etc.) and economic downturns, and also to expand during favorable economic times. Title insurers often meet that need, taking an ownership interest in title agencies in exchange for capital infusions.

The Ninth Circuit's decision, if uncorrected, needlessly threatens to disrupt these lawful, beneficial ownership interests and preferential agreements between insurers and agencies. It would allow plaintiffs to challenge these interests and arrangements under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, even when, as here, the plaintiffs suffered no injury

at all. Accordingly, *amici* urge the Court to reverse the Ninth Circuit's decision.

INTRODUCTION

When Respondent Denise Edwards purchased title insurance in 2006, the State of Ohio authorized one uniform schedule of rates. Edwards thus did not pay a single penny more for First American title insurance than she would have paid for insurance offered by any other insurer in the State.[2] She nonetheless filed a putative class action alleging she was injured as a result of First American's partial ownership of, and preferential relationship with, Tower City Title Co., the title agent that sold the policy.

Edwards's suit should be dismissed because she cannot meet constitutional standing requirements. As Petitioners explain, the mere existence of a statutory right of action does not satisfy Article III. Pet. Br. 37-42. Nor does Edwards's amorphous allegation of "informational injury." *Id.* at 29-36. Without repeating them here, *amici* endorse Petitioners' arguments on these issues.

Amici instead address Edwards's alternative argument, raised for the first time in her appellate briefs and entirely absent from the complaint, that she suffered economic injury despite paying only the uniform, state-approved rate for title insurance. Under her theory, which she has barely explained,

---

[2] In this brief, "First American" refers to Petitioner First American Title Insurance Company, except where it refers to actions taken in the litigation, in which case it refers to Petitioners First American Financial Corp. (as successor in interest to The First American Corp.) and First American Title Insurance Company.

preferential arrangements between title insurers and agents "thwart competition" for business from homebuyers, and thus have "systemic" effects on the regulated industry, raising the state-approved rates for everyone. See Resp. Br. in Opp. 22-23. This theory has no merit and should be rejected.

First, Edwards did not allege any economic injury in her complaint—"systemic" or otherwise—despite having the burden to do so, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is only in subsequent briefing that Edwards introduces a theory of "systemic" economic injury.

Second, Edwards's suggestion of economic harm depends upon hypothetical assumptions that are far too speculative to constitute an injury-in-fact. She assumes that the Ohio superintendent of insurance approved rates that were increased "as a result of a kickback scheme," Resp. Br. in Opp. 22, even though the superintendent has a statutory duty to ensure that title insurance rates are not "excessive," Ohio Rev. Code Ann. § 3935.03(B). She also assumes that eliminating the accused arrangements would lead insurers to "compete . . . by offering homebuyers lower prices," Resp. Br. in Opp. 22, even though rates in Ohio are not simply the product of competition but instead reflect the requirements of state regulation. And, she assumes both that title insurers sought excessive rates (itself an unsupported and erroneous assumption) and that they would not have done so in the absence of the referral arrangements, even though the insurers' economic incentives would remain the same. These speculative assumptions render her injury a "remote possibility, unsubstantiated by allegations of fact," and insufficient for standing. *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

Third, Edwards's theory fails because she cannot trace the supposedly excessive premiums to First American's accused arrangement. To the contrary, the premium that Edwards paid resulted from "the unfettered choices made by independent actors not before the courts," *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion), including other title insurers, the Ohio Title Insurance Rating Bureau, and the Ohio superintendent of insurance.

Permitting Edwards's case to proceed under this theory of standing would set a dangerous precedent. It would invite similarly misguided class actions by uninjured plaintiffs who seek to use RESPA as a vehicle to extort settlement payments from insurers. To deter such nuisance suits, preserve state authority over insurance, and enforce the Judiciary's proper limits, the Court should reverse the decision below and order dismissal of Edwards's complaint.

BACKGROUND ON REGULATION OF THE TITLE INSURANCE INDUSTRY

As an initial matter, to put Edwards's argument in context, it is necessary to examine the regulatory background of title insurance.

A. States have long exercised primary authority to regulate insurance, including title insurance. See *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538-39 (1978); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 415-16 (1946). In the early 1900s, States recognized the need to make sure insurance rates were neither too low nor too high. See Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 Mich. L. Rev. 545, 546-47 (1958). Throughout the 1800s, the insurance industry experienced periods in which premiums dropped to

levels too low to cover losses caused by large disasters, leading to widespread insurer insolvencies. See *id.* at 547-49. In response, insurers sought to collaborate in sharing actuarial information and setting rates through private agreements. *Id.* at 548-49. This, in turn, created the risk that insurers would seek inflated rates. *Id.* at 549-50.

States began to address these twin problems by empowering state insurance commissioners to guarantee that rates were "adequate but not excessive," while also "authorizing the formation of private rating bureaus but controlling their practices." *Id.* at 551; see *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 414-15 (1914) (affirming States' power to regulate insurance rates because insurance "is of the greatest public concern"). As they do today, rating bureaus facilitated the sharing of actuarial and financial data among insurers in order to seek approval for appropriate rates. See *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 628 (1992).

This Court's decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944), called into doubt the viability of state regulation of insurance rates. In particular, the Court held that the Sherman Act prohibited rate-making collaboration through insurance rating bureaus. *Id.* But Congress responded by passing the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011 *et seq.*, to preserve "existing and future state systems for regulating and taxing the business of insurance." *Prudential*, 328 U.S. at 429. To that end, the Act specifies that no federal statute "shall be construed to invalidate, impair, or supercede" any state regulation of insurance. 15 U.S.C. § 1012(b). The Act also provides that federal antitrust laws

apply to the business of insurance only "to the extent that such business is not regulated by State law." *Id.*

In the wake of the *South-Eastern Underwriters* decision and passage of the McCarran-Ferguson Act, States became even more active in regulating insurance rates. Kimball & Boyce, *supra* at 554-56. In the late 1940s and 1950s, numerous States adopted comprehensive regimes to review and approve insurance rates filed by insurers or rating bureaus, and many of these regimes extended to title insurance. See Rosenberg, *Historical Perspective of the Development of Rate Regulation of Title Insurance*, 44 J. of Risk & Ins. 193, 200-01 (1977).

B. The Ohio statute at issue in this case is a typical prior-approval regime. Since 1953, Ohio has mandated that all insurers, including title insurers, file their rates with the superintendent of insurance. Ohio Rev. Code Ann. § 3935.04(A). The superintendent reviews the filed rates to ensure they are not "excessive, inadequate, or unfairly discriminatory," *id.* § 3935.03(B), in light of specified criteria, *id.* § 3935.03(C). These criteria are designed partly to see that insurers receive sufficient revenue to remain solvent and able to pay policyholders' claims. See, *e.g.*, *id.* § 3935.03(C)(3) (requiring "[a] reasonable margin for underwriting profit and contingencies"); see also *id.* § 3953.05 (requiring specified "minimum capital and surplus"). An insurer may satisfy its obligation to obtain approval of rates by joining a licensed rating bureau that files rates on behalf of its members. *Id.* § 3935.04(B). "Co-operation" among "rating bureaus and insurers" is expressly authorized, and the superintendent may review "co-operative activities and practices" to halt any practices that are "unfair [or] unreasonable." *Id.* § 3935.06. If the superintendent does not object to

the filed rates within 30 days, they take effect. *Id.* § 3935.05(B). "Any person or organization" harmed by a rate filing may petition the superintendent for a hearing to review the filing. *Id.* § 3935.05(D).

Significantly, in 2006, when Edwards purchased the title insurance policies at issue (one covering her lender's interest and another covering her own), every licensed title insurer in Ohio was a member of the Ohio Title Insurance Rating Bureau that obtained state approval for a schedule of rates. See J.A. 38 ¶¶ 5-7. Thus, the only title insurance premium authorized to be charged in Ohio was the premium that Edwards paid.

C. Other States use a variety of similar methods to regulate title insurance rates. Nineteen States, including Ohio, require prior approval of rates. See Nat'l Ass'n of Ins. Comm'rs, *Survey of State Insurance Laws Regarding Title Data and Title Matters* 8 (2010), *available at* http://www.naic.org/documents/committees_c_title_tf_survey_state_laws.pdf (listing 13 "prior approval" States and Puerto Rico, and describing variations used by Alabama, Indiana, Louisiana, Maryland, Missouri, and North Dakota). Nineteen other States use a retrospective approval process. *Id.* (listing 17 "file and use" States, which allow use of rates after filing but before approval; one "use and file" State, which requires use of the rate before filing for approval; and describing Idaho's similar regime). Four States mandate fixed, state-set rates. *Id.* One State, Iowa, mandates use of state-provided title insurance in lieu of private title insurance. *Id.* And, at the other end of the spectrum, seven States and the District of Columbia do not regulate title insurance rates. *Id.*

Of the States that do regulate title insurance rates, virtually all—38 in total, and Puerto Rico—apply

very similar statutory standards, requiring that rates not be "excessive, inadequate, or unfairly discriminatory." *Id.* at 9. Further, many of these States expressly authorize title insurance companies and rating bureaus to cooperate in seeking approval of rates. See, *e.g.*, Alaska Stat. § 21.66.410(c) ("each title insurance company may exchange information and experience data with . . . [other] title insurance companies, and title insurance rating organizations . . . and may consult with them and with each other with respect to rate making and the application of rating systems"); N.J. Stat. Ann. § 17:46B-41 ("authoriz[ing] cooperative action between or among title insurance companies in rate making"); see also, *e.g.*, Del. Code Ann. tit. 18, § 2526; N.Y. Ins. Law §§ 2313(o), 6409. These States permit cooperation, subject to state supervision, on the view that the resulting rates may be more appropriate—neither excessive nor inadequate to permit insurers to remain solvent in economic downturns—than rates proposed by insurers acting alone.

Congress has never disturbed these state regimes governing insurance ratemaking. Rather, it remains Congress's stated policy that state regulation of insurance "is in the public interest." 15 U.S.C. § 1011.

ARGUMENT

Edwards's theory of "systemic" economic injury, which was not even raised in her complaint and is ultimately a challenge to the state-approved rate, must be rejected. The Constitution requires a plaintiff to allege an injury that is not speculative and that is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen* v. *Wright*, 468 U.S. 737, 751, 753 (1984). Edwards has alleged no

economic injury at all, let alone any "systemic" injury. Further, her suggestion of injury is entirely speculative and not traceable to the allegedly unlawful conduct. Finally, allowing Edwards's suit to proceed would open the federal courts to other misguided suits and class actions that, in effect, attack insurance rates approved by the States.

I. EDWARDS DOES NOT HAVE STANDING BASED UPON A THEORY OF SYSTEMIC ECONOMIC HARM

A. Edwards Has Not Pleaded A Claim Of Economic Injury

"The party invoking federal jurisdiction bears the burden of establishing" each element of standing. *Lujan*, 504 U.S. at 561; see *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990). These elements are "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus, to survive a motion to dismiss, Edwards's complaint must adequately allege each element of her standing. See, *e.g.*, *Warth*, 422 U.S. at 501 (requiring "particularized allegations of fact deemed supportive of plaintiff's standing").

1. Edwards cannot base her standing on a so-called "systemic" economic injury because her complaint fails to allege any such harm. The complaint does not state that Edwards endured any monetary loss, let alone a loss resulting from purported "systemic effects" of "kickbacks" that supposedly inflated the state-approved rate. Indeed, the complaint makes only passing reference to the

premium Edwards paid without even alleging that it was unlawfully high. See Pet. App. 53a-54a.

The closest Edwards comes to claiming an economic injury is her statement that First American's allegedly "exclusive (and secret) referral agreements . . . den[ied] [plaintiffs] critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance.'" Pet. App. 49a (Compl. ¶ 5). She later alleges that the alleged RESPA violation "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market." *Id.* at 52a (Compl. ¶ 17). Thus, the crux of Edwards's claim is that she was denied "information" and an "opportunity" to shop around. She does not claim that having this information and opportunity would have saved her any money. Indeed, she cannot make that claim because Ohio authorized only one rate for title insurance.

It is therefore no surprise that the lower courts did not address whether Edwards had standing based upon a claim of economic harm. See Pet. App. 4a ("Plaintiff does not and cannot make th[e] allegation" that "the charge for title insurance was higher than it would have been without the exclusivity agreement"); *id.* at 14a ("Edwards admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price . . . ."). She simply failed to allege any such injury.

2. Perhaps recognizing that a lost "opportunity" to choose among identical state-approved rates is no loss at all, Edwards has proposed a radically different theory in subsequent briefing. See Resp. Br. in Opp. 22-23. Although her complaint makes no mention of so-called "systemic effects," she has argued in her briefs that the state-approved rate was somehow

inflated by the "systemic effects" of the accused arrangements. *Id.* at 22. In her view, apparently, the title insurance premium approved by Ohio would have been lower if First American had not engaged in the allegedly unlawful arrangements at issue. See *id.*

This contention of economic harm cannot support Edwards's standing because she did not plead it in her complaint. See *Lujan*, 504 U.S. at 561. Her fleeting references to "costs" and "prices," see Pet. App. 49a, 52a (Compl. ¶ 5, 17), are too vague to support this belated assertion of "systemic" injury—particularly because her claim of injury was tied to the absence of "information," not the level of title insurance premiums. Moreover, even if her theory appeared in the complaint, she still would lack standing because she has not articulated "[f]actual allegations . . . enough to raise" her claim of standing "above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (plaintiff must allege more than "an unadorned, the-defendant-unlawfully-harmed-me accusation"). See *infra* I.B.

Quite likely, Edwards has avoided pleading an economic injury for strategic reasons. Claiming that the alleged unlawful arrangements increased the state-approved premium is necessarily a challenge to the premium itself. But an attack on the state-approved premium would immediately be subject to dismissal on several grounds. First, that claim would contravene the McCarran-Ferguson Act, which disallows construing a federal law to "invalidate, impair, or supersede" the Ohio insurance regulatory regime. 15 U.S.C. § 1012(b); see *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 853-54 (N.D. Ohio 2010) (dismissing challenge to Ohio-approved rates as inconsistent with McCarran-Ferguson Act),

appeal docketed sub nom. Katz v. *Fid. Nat'l Title Ins.*, No. 10-3545 (6th Cir. filed Apr. 30, 2010). Second, the filed rate doctrine provides that once a regulatory agency approves a rate, it becomes legal and beyond challenge in a suit for damages. See *Keogh* v. *Chi. & Nw. Ry.*, 260 U.S. 156, 162 (1922). Courts have repeatedly applied the doctrine to decline review of state-approved insurance premiums. See *In re Title Ins. Antitrust*, 702 F. Supp. 2d at 849 n.7 (collecting cases). Accordingly, the Ohio rate is deemed legal, and Edwards could not claim it is excessive. See, *e.g.*, *Morales* v. *Attorney's Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (dismissing RESPA claim for lack of standing because "the plaintiffs' claims are nothing more than a challenge to Florida's rate structure," barred by the filed rate doctrine). Likely for these reasons, Edwards deliberately avoided alleging any economic injury.

B. Edwards's Theory Of Economic Harm Is Too Speculative To Qualify As An Injury-In-Fact

Nonetheless, even assuming that Edwards had alleged in her complaint that the arrangements at issue led to a "systemic" increase in premiums, she still would lack standing. Judged by this Court's well-settled precedents, Edwards's theory of economic injury is too speculative to constitute an injury in fact.

1. To gain access to a federal court, a "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks omitted). It does not suffice to point to a "remote possibility, unsubstantiated by allegations of fact, that [a plaintiff's] situation might

have been better had [the defendant] acted otherwise." *Warth*, 422 U.S. at 507. The Court has therefore consistently dismissed suits when a plaintiff's alleged injury "requires speculating" about what would happen in the absence of the defendant's accused conduct. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344-45 (2006); see, *e.g.*, *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443-44 (2011) (taxpayers lacked standing to challenge tax credits based on "speculation that Arizona lawmakers react to revenue shortfalls by increasing [plaintiffs'] tax liability"); *Allen*, 468 U.S. at 758 (dismissing challenge to a tax exemption for racially segregated schools because availability of desegregated education depended upon "pure speculation"). An injury-in-fact must rest on more than "hypothetical assumptions." *ASARCO*, 490 U.S. at 614 (plurality opinion).

Edwards's theory of economic harm cannot support her standing. Her burden is to show that the price she paid for title insurance would have been lower if First American had not entered allegedly unlawful referral arrangements. But this calls for "pure speculation," *Allen*, 468 U.S. at 758, about several "hypothetical assumptions," *ASARCO*, 490 U.S. at 614 (plurality opinion).

First, Edwards assumes that the Ohio superintendent of insurance approved inflated prices in violation of his statutory duties. The superintendent is obligated to prohibit "excessive" rates and unfair cooperation by insurers. Ohio Rev. Code Ann. §§ 3935.03(B), 3935.06. In this case, the superintendent reviewed an extensive rate submission by the rating bureau and had the power to require additional information, *id.* § 3935.04(A). Edwards offers no allegation that this process was corrupted.

By contrast, after extensive analysis, a federal district court recently held that the Ohio rate-setting process for title insurance involves meaningful review. See *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d at 853-54 (holding that the filed rate doctrine precluded antitrust challenge to Ohio title insurance rates).

Second, Edwards assumes that eliminating the accused arrangements with title agents would have led to lower premiums. But she never explains why, other than badly asserting that, in the absence of such arrangements, insurers "will have to compete . . . by offering homebuyers lower prices." Resp. Br. in Opp. 22. This assertion is ill-founded. Regardless of the accused arrangements, insurance rates in Ohio are not simply the product of competition, but instead reflect the requirements of state regulation. In regulating these rates, Ohio, like most States, takes into account a variety of considerations, including the public interest in guaranteeing insurer solvency in economic downturns. See Ohio Rev. Code Ann. §§ 3935.03(C), 3953.05; see also *supra* 7-9.

In addition, title insurers' incentives and ability to obtain a particular rate permitted by state law does not depend upon the presence or absence of alleged referral fees to title agents. There is no reason to believe that, in the absence of the alleged arrangements, First American (or the rating bureau) would have sought a lower rate than the one currently approved by the State as a reasonable rate.[3]

---

[3] Edwards apparently admits as much, suggesting elsewhere that her alleged injury resulted not from an alleged RESPA violation, but from the unsupported accusation that "the state

Edwards's assumption that insurers would have voluntarily sought lower premiums is, at best, speculative.

Further, Edwards provides no explanation for why the accused arrangements between insurer and agent would diminish competition for sales to homebuyers, who are the ultimate purchasers. Currently, agents compete on the basis of service, reliability, and financial strength to win these sales (whether made directly to homebuyers or through referrals by realtors and mortgage brokers). In addition, when permitted by state regulations, insurers and agents compete for business on the basis of price. Edwards offers no reason why the accused arrangements with agents would affect such competition for homebuyers.

2. Edwards's standing is not helped by the fact that she alleges a statutory violation. To be sure, Congress has the power to "broaden[] the categories of injury that may be alleged in support of standing." *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972). Congress thus may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578; see also *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007). But Congress does not have the power to abrogate the constitutional requirement of an injury-in-fact. It is "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). In every case, the plaintiff must allege a "concrete and particularized" injury that is "'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560.

---

rate-setting scheme . . . allow[s] the dominant insurers to set prices at monopoly levels." Resp. Br. in Opp. 6 n.3.

Consequently, Edwards's suggestion of economic injury fares no better just because she alleges a RESPA violation. Edwards's argument is entirely speculative and premised upon hypothetical assumptions. It should be rejected.

C. Edwards's Theory Of Economic Harm Is Not Traceable To Tower City's Accused Arrangement With First American

Edwards's bid for standing also fails because her supposed economic injury is not traceable to First American's allegedly unlawful arrangements.

1. Constitutional standing requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" *Lujan*, 504 U.S. at 560 (alteration and omissions in original). Causation cannot be shown if the alleged injury resulted from "the unfettered choices made by independent actors not before the courts." *ASARCO*, 490 U.S. at 615 (plurality opinion), *quoted in Lujan*, 504 U.S. at 562. Thus, a plaintiff lacks standing if the claimed injury "is highly indirect and 'results from the independent action of some third party.'" *Allen*, 468 U.S. at 757 (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)); see also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973) (holding that plaintiff-mother could not challenge the State's non-enforcement of a child-support requirement because she could not "show[] that her failure to secure support payments results from nonenforcement, as to her child's father").

As detailed above, Edwards contends she suffered an economic injury only as a result of multiple third parties' independent choices. The Ohio super-

intendent of insurance approved the rates. Other title insurers besides First American are members of the Ohio Title Insurance Ratings Bureau and contributed to its submission of proposed rates. J.A. 38 ¶¶ 5-7. Even absent the accused arrangements, the title insurers may still have sought approval for the same rates, and the superintendent of insurance may still have approved them. Thus, there simply is no causal connection between the accused referral arrangements and the premium Edwards paid. Edwards's standing theory is even weaker than claims previously found lacking by this Court. See, *e.g.*, *Allen*, 468 U.S. at 759 ("The links in the chain of causation between the challenged . . . conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

2. Edwards's allegation of a RESPA violation does not excuse her inability to trace the supposed economic harm to First American's accused arrangements. Congress may "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts*, 549 U.S. at 516. In so doing, however, "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'" *Id.* Thus, when a statute confers upon a class of persons an interest in enforcement of its provisions, and an individual within that class suffers a concrete harm "of a kind" the statute was "designed to protect [against]," that individual may have standing to bring suit as a means of vindicating the statutorily protected interest, even if the individual cannot "'meet[] all the normal standards for redressability and immediacy'" that would apply in the absence of the statute. *Id.* at 517-18; see *FEC* v.

Akins, 524 U.S. 11, 20 (1998); *Lujan*, 504 U.S. at 572-73 & nn.7-8, 578.

Edwards's theory does not satisfy those criteria. In enacting RESPA, Congress did not "identify" payment of title insurance rates approved by state regulators as an injury to be redressed by title insurance purchasers. Nothing in the text of RESPA remotely suggests that Congress had such injuries in mind. To the contrary, Congress left undisturbed the McCarran-Ferguson Act, the filed rate doctrine, and the long-standing authority of States to regulate insurance rates. Indeed, while debating RESPA, Congress rejected a proposal to establish federal control over rates "because to do so would infringe on an area that historically has been governed by the states." Palomar, *Title Insurance Law* § 21:11 (2010); see S. Rep. No. 93-866, at 4 (1974). Given this history, Edwards's theory of economic injury should be rejected.

II. IF ACCEPTED, EDWARDS'S THEORY OF STANDING WOULD FLOOD THE TITLE INSURANCE INDUSTRY WITH MERITLESS LAWSUITS

The practical consequences of Edwards's theory of standing, if accepted, are serious and further counsel in favor of dismissal. Affirming the decision below would likely open the floodgates by encouraging other uninjured plaintiffs to file similar meritless lawsuits.

There are undoubtedly millions of title insurance purchasers who could draft a complaint like Edwards's.[4] Many of Edwards's allegations concern

---

[4] Indeed, multiple cases involving allegations similar to Edwards's are currently pending in the district courts. *See*, e.g., *Toldy* v. *Fifth Third Mortgage Co.*, No. 09-cv-377 (N.D. Ohio

structures and practices that are commonplace in the title insurance industry. Title insurers often invest in title agencies. Likewise, title insurers and title agencies frequently form preferential arrangements. These ownership interests and preferential arrangements serve legitimate business purposes.[5] They are legal under RESPA so long as they are not "shams" that conceal payments for referrals. See 12 U.S.C. §§ 2602(7), 2607(c)(4); 24 C.F.R. § 3500.14(g)(2). Yet, it is "'easy to allege and hard to disprove'" a sham, *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998), because the truth of the matter turns on the minutia of the companies' finances and operations. See HUD Statement of Policy 1996-2, 61 Fed. Reg. 29,258, 29,262 (June 7, 1996) (listing ten fact-intensive factors used to identify sham arrangements).

As a result, even meritless complaints alleging sham arrangements may not be "amenable to summary disposition" on the merits. *Crawford-El*, 523 U.S. at 585. In cases like this one, in which a plaintiff paid a state-approved rate for title insurance, the complaint can and should be dismissed for lack of standing at the outset. If, however,

---

filed Feb. 18, 2009); *Minter* v. *Wells Fargo Bank, N.A.*, No. 07-cv-3442 (D. Md. filed Dec. 26, 2007).

[5] Vertical integration of the title insurer and title agent can lower transaction costs by eliminating duplicative services, decreasing the frequency of costly mistakes, and reducing marketing expenses. *See* Martin & Ludwick, CapAnalysis Group, LLP, *Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs: An Economic Analysis* 8-9 (2006), *available at* http://www.respro.org/docs/CAP%20RESPRO%20Study%20(2).pdf. Likewise, a preferential relationship may simplify the agent's process, build familiarity with a title insurer, and provide better access to advice on title issues, all of which reduces transaction costs. These lower costs may be passed on to the purchaser. *Id.*

Edwards's theory of "systemic effects" were sufficient to provide standing, title insurers would be left to defend against countless identical suits raising copy-cat claims that are difficult to disprove.

Even more problematic, where, as here, the complaint is styled as a class action, the inevitable result will be to put intense pressure on title insurers to settle. In enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Id.* Needless to say, "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21; see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (explaining how the prospect of "extensive discovery" can enable "plaintiffs with weak claims to extort settlements from innocent companies").

This potential for suits that "extort settlements" demonstrates why it is imperative for this Court to reject Edwards's flawed standing theory. "In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Winn*, 131 S. Ct. at 1449. States exercise authority to regulate insurance

premiums, and Edwards's conjecture that those rates were somehow inflated does not give her standing to sue. The decision below should be reversed.

CONCLUSION

For these reasons, and those stated by Petitioners, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

GERARD D. KELLY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

PETER D. KEISLER*
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com
Counsel for Amicus Curiae Stewart Financial Services Corporation

JOHN L. KILLEA
PAMELA BUTLER O'BRIEN
STEWART TITLE GUARANTY COMPANY
1980 Post Oak Boulevard
Suite 710
Houston, TX 77056
(713) 625-8250
Counsel for Amicus Curiae Stewart Information Services Corporation

MARK E. SCHIFFMAN
CHRISTINE R. MILTON
FIDELITY NATIONAL FINANCIAL, INC.
601 Riverside Avenue
Building V, 7th Floor
Jacksonville, FL 32204
(904) 854-8901
Counsel for Amicus Curiae Fidelity National Financial, Inc.

ELAINE L. LAYTON
OLD REPUBLIC
NATIONAL TITLE
INSURANCE COMPANY
125 Technology Drive
Suite 101
Canonsburg, PA 15317
(724) 746-2777
Counsel for Amicus
Curiae Old Republic
National Title
Insurance Company
* Counsel of Record

August 29, 2011

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
OCT 18 2011
OFFICE OF THE CLERK

No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, AND FIRST AMERICAN TITLE INSURANCE COMPANY,

Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* TOYOTA ECONOMIC-LOSS PLAINTIFFS IN SUPPORT OF RESPONDENT

MARC M. SELTZER
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars,
Suite 950
Los Angeles, CA 90067
(310) 789-3102

FRANK M. PITRE
COTCHETT, PITRE
& MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

STEVE W. BERMAN
Counsel of Record
HAGENS BERMAN SOBOL
SHAPIRO LLP
1918 Eighth Avenue,
Suite 3300
Seattle, WA 98101
(206) 268-9320
steve@hbsslaw.com

Counsel for Amicus Curiae

239001

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTEREST OF THE *AMICUS CURIAE*	1
II. SUMMARY OF ARGUMENT	2
III. ARGUMENT	3
A. The Court accepted for review a single, narrow question regarding constitutional standing to assert a RESPA violation	3
B. The Automakers ask the Court to substitute a fundamentally different question	6
C. The Court should not address the Automakers' substituted question because it diverges materially from the presented question and is not ripe for this Court's consideration	8
IV. CONCLUSION	14

TABLE OF CITED AUTHORITIES

Page

Cases:

Briehl v. General Motors Corp., 172 F.3d 623 (8th Cir. 1999) 12

Cole v. GMC, 484 F.3d 717 (5th Cir. 2007) 11

Daffin v. Ford Motor Co., 458 F.3d 549 (6th Cir. 2006) 12

DaimlerChrysler Corp. v. Inman, 252 S.W.3d 299 (Tex. 2008) 12

In re Bridgestone/Firestone Tires Prods. Liab. Litig., 288 F.3d 1012 (7th Cir. 2002) 13

In re Toyota Motor Corp., 2011 U.S. Dist. LEXIS 52529 (C.D. Cal. May 13, 2011) 3, 10, 11

In re Toyota Motor Corp., 754 F. Supp. 2d 1145 (C.D. Cal. 2010) 9, 10, 11

Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168 (9th Cir. 2010) 12

Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986) 12

Statutes:

Supreme Court Rule 37 1

Cited Authorities

	Page
Supreme Court Rule 37.6	1
Supreme Court Rule 37.3	1
12 U.S.C. § 2607(d)(2)	8

I. INTEREST OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the *Toyota* Economic-Loss Plaintiffs respectfully submit this brief as *amicus curiae*.[1]

The *amicus curiae* are plaintiffs asserting breach-of-warranty and other claims to recover their economic losses against Toyota Motor Corporation and its subsidiary, Toyota Motor Sales, U.S.A., Inc. (collectively, "Toyota") in the consolidated multi-district litigation, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 11-80187, C.D. Cal. Case No. 8:10-ML-02151 JVS (FMO). The *Toyota* Economic-Loss Plaintiffs are interested in this appeal as the result of the effort of *amici curiae* Association of Global Automakers, Inc. and the Alliance of Automobile Manufacturers (collectively, the "Automakers") to change the limited question accepted by this Court into a much broader inquiry, not tethered to any particular statutory remedy. The Automakers' substituted question coupled with their brief's skewed portrayal of claims asserted against several of its members, expressly including claims

---

1. Pursuant to Supreme Court Rule 37.6, the *Toyota* Economic-Loss Plaintiffs *amicus curiae* note that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel contributed monetarily to the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, the *Toyota* Economic-Loss Plaintiffs note that blanket letters of consent to file this and all other *amicus* briefs are on file with the Clerk of the Court.

asserted in the *Toyota* litigation, give rise to the *Toyota* Economic-Loss Plaintiffs' interest in this case.[2]

II. SUMMARY OF ARGUMENT

The core of the question presented in this appeal is whether Congress can create Article III standing for private plaintiffs under RESPA by invoking a long-standing presumption of injury and providing for restitution. The parties' briefs and innumerable *amicus* submissions debate this question. But one *amici curiae* brief, submitted by the Automakers, does not. The Automakers seek to substitute a different question, one that (i) assumes the absence of any injury, (ii) invokes scenarios where the presumption of injury does not apply, and (iii) ignores the RESPA claim's link to unjust enrichment and restitution. Their substitute question asks whether a purchaser of any good or service who, while subjected to a violation of a legal duty, was not harmed has constitutional standing to sue. The Automaker's alternate question is outside this lawsuit. The parties never submitted argument about it; the lower courts never addressed it. And only one *amicus* brief raises it. It is unripe for consideration by this Court.

Further, the Automaker's opportunistic arguments, allowed here solely by dint of the parties' blanket consent to all *amicus* briefs, exemplify why the Court rejects consideration of unripe, extraneous issues. The Automakers' brief provides a completely inadequate foundation for a decision by this Court. The heart of

---

2. A Toyota affiliate is a member of both of the Automakers *amici*.

the brief is a false premise: that a legion of lawsuits asserting claims on behalf of classes that *suffered no harm* threatens American businesses. The Automakers denounce them as "no-injury" lawsuits and declare themselves targets of such. But their examples are spurious. In their cited vehicle-defect cases, for example, a part defect, while not necessarily manifesting in every vehicle, nonetheless pervaded a vehicle model and posed sufficient risk as to impair every vehicle's value, imposing measurable economic losses on every purchaser. *See, e.g., In re Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 52529, at *104-05 (C.D. Cal. May 13, 2011). The Automaker's "no-injury" label is unwarranted, as are their alarms of "ruinous liability."

More to the point, cases in which plaintiffs' actual economic losses established Article III standing present different considerations from the present appeal. The Court's consideration of the presented question should not extend to the Automaker's alternate, unripe question.

III. ARGUMENT

A. The Court accepted for review a single, narrow question regarding constitutional standing to assert a RESPA violation

On June 20, 2011, the Court granted a petition for a writ of *certiorari* on the following question limited strictly to whether a RESPA violation supports Article III standing to the affected consumer absent evidence of injury:

> Section 8(a) of the Real Estate Settlement

Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." § 2607(d)(2).

The question presented is:

Does a private purchaser of real estate settlement services, in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided, have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

Petitioners address this issue, as they must. Petitioners appropriately paraphrased the reviewed issue, Petitioners Br. at i, and went on to argue that Respondent (plaintiff

below) did not allege that the RESPA violation caused any "concrete injury," whether pecuniary, informational or other, *id.* at 26-36. Petitioners argue that "[t]he allegations of injury in Edwards's complaint are narrowly circumscribed,... and the complaint carefully avoids any allegation of adverse effect on Edwards personally. The complaint thus does *not* allege that petitioners' conduct "made her worse off economically in any way," or, specifically, that the conduct caused her to overpay or "receive less value for her money than she otherwise would have received." *Id.* at 26-27. Petitioners note that plaintiff Edwards alleges some speculative "systemic effects," but "the complaint does not allege that the price that she paid actually was higher (or quality lower) because of the conduct challenged in this case." *Id.* at 27.

Petitioners identify the sort of allegations that indisputably would confer Article III standing where anticompetitive conduct has manipulated a market: "a plaintiff must allege ... that, absent the unlawful conduct, the price plaintiff paid would have been lower (or quality higher) such that the plaintiff has suffered a concrete economic harm." *Id.* at 28.

Respondent likewise addresses only the issue accepted by the Court. Respondent opens with an appropriate paraphrase of the question presented. Respondent's Br. at i. Citing the "no-further-inquiry" rule, Respondent later points to long-standing precedent that a party's interest in receiving service untainted by kickbacks or other conflicting interests is a concrete, legally protectable interest, and that in similar circumstances injury is conclusively presumed and Congress merely applied that rule in RESPA and provided restitution as relief. *E.g.*,

id. at 15-16, 28-31, 34, 35-36. Respondent separately cites Congress's independent authority to define injuries, create new legal rights and provide remedies for violations. *Id.* at 16-17, 38-44.

At this Court's request, the United States Solicitor General submitted a brief that likewise addressed the specific presented issues. The Solicitor General's brief urged the Court to decline certiorari, explaining that Congress viewed corruption that taints a real-estate settlement service as injuring the consumer's RESPA right to information sufficient to support Article III standing even absent proof of impact on the service's price or quality. *E.g.*, *Amicus* Brief of the United States (filed May 19, 2011) at 12-13.

Accordingly, as the presented question provides, this Court is addressing (and the parties are briefing) whether purchasers of real-estate settlement services have standing to assert a RESPA claim for services tainted by kickbacks or other corrupt practices where RESPA presumes rather than requires proof of injury and provides for treble refunds based on unjust-enrichment principles.

B. The Automakers ask the Court to substitute a fundamentally different question

But this is not the question the Automakers want the Court to hear. Fifteen *amici* submit briefs supporting the Petitioners' position. Only one *amici* brief – that filed by the Automakers – proffers a new, fundamentally different question. *See* Automakers Br. at i.[3] The Automakers

3. The brief supporting Petitioners submitted by *amici curiae* Facebook, Inc., *et al.*, reproduces verbatim the question

would untether the presented question from whether Article III standing can arise from a private RESPA claim to recover restitution based on a presumption of injury from a RESPA violation. They would substitute in its place a question (i) reaching to purchasers of *any* "goods or services" (ii) subjected to a violation of *any* "legal duty," whether contractual, common law or otherwise, and (iii) that assumes no harm. To wit:

> Whether a person who in the course of buying goods or services has been subjected to a violation of a legal duty, but has sustained no tangible, emotional, or economic harm as a result, has standing to sue under Article III, § 2. [Automakers Br. at i.]

The Automakers thus would strip from the presented question any aspect of RESPA's premises that purchasers of real-estate settlement services are (i) entitled to receive untainted information about the services they are purchasing, (ii) injured when kickbacks or other RESPA-barred tactics corrupt that information, and (iii) entitled to a treble refund of the amount paid for the services. The substituted question instead encompasses purchases in any context and where presuming injury is plainly inappropriate. The Automakers thus jettison the central inquiry to the presented question: whether Congress can constitutionally allow a home purchaser to assert a private

---

presented. The brief submitted by *amici curiae* National Association of Home Builders *et al.* reproduces the single question as paraphrased by Petitioners. The brief submitted by *amicui curiae* Pacific Legal Foundation *et al.* accurately paraphrases the question presented. The remaining *amici* briefs do not state the question.

claim for a RESPA violation by conclusively presuming injury from the purchase of a settlement service tainted by kickback, entitling the purchaser to restitution. 12 U.S.C. § 2607(d)(2).

C. The Court should not address the Automakers' substituted question because it diverges materially from the presented question and is not ripe for this Court's consideration

The question accepted by this Court is fully ripe for consideration. Petitioner and Respondent collectively are submitting thorough and balanced arguments on the presented question, honed by district-court and appellate briefing. Fourteen *amici curiae* have submitted briefs supporting Petitioner's arguments (and an unknown-at-this-time number of *amici* briefs supporting Respondent's). But not so for the Automakers' substituted question. Only the Automakers address it, and their brief makes no attempt at a fair and balanced discussion. Their question is far from ripe for this Court's consideration.

The Automakers' brief is also a poor springboard for a decision on a different question than the one the Court accepted. Indeed, the heart of the brief is a false premise: that a legion of lawsuits asserting claims on behalf of classes that suffered no harm threatens American businesses. The Automakers attempt to link the present appeal to a purported "much wider trend" that "has ensnared many" of their members in "high-stakes litigation" brought by "plaintiffs and putative class members *who have sustained no harm*." Automakers Br. at 4 (emphasis added). According to the Automakers, these plaintiffs assert "a theory of liability that requires

them to prove only their purchases and the defendant's conduct." *Id.* The result, they state, "permits the judiciary to intervene when no one has been ... harmed at all," purporting to lead to a "drastic and absurd" result: "the lesser the injury, the broader the class, the greater the damages exposure, and the larger the settlement." *Id.* at 4-5.

The Automakers then bemoan that they are "frequent targets" of such "no-injury" lawsuits, in which they face liability and "ruinous" damages to purchaser classes for defects that never manifested and "did not harm even the representative plaintiff under any definition of 'injury' that is not perfectly circular." *Id.* at 5, 6.

In reality, however, there is no plague of class-action claims threatening enormous damage awards despite the absence of any actual injuries, and the few illustrative vehicle cases cited by the Automakers involved actual, economic harm. The Automakers spotlight a pending litigation, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 11-80187, C.D. Cal. Case No. 8:10-ML-02151 JVS (FMO), as "[t]he best-known example" of the so-called no-injury litigation. Automakers Br. at 6-7. Plaintiffs in that consolidated case were injured in various ways by incidents of sudden unintended acceleration ("SUA") in Toyota vehicles with an electronic throttle-control system ("ETCS"), which severs the mechanical link between the accelerator pedal and the engine. *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1156 (C.D. Cal. 2010) ("*Order 1*"). SUA accidents have injured and killed drivers, passengers and by-standers, wrecked property, and slashed the values of afflicted models as Toyota

toppled from its premier position as the perceived maker of the world's safest, most reliable automobiles.

The Automakers complain about the claims of a subset of plaintiffs – the *Toyota* Economic-Loss Plaintiffs *amicus* – who did not personally experience a SUA event and their proposed class of similarly situated Toyota vehicle purchasers. Automakers' Br. at 7. The Automakers denounce this as a "no-injury" class where plaintiffs need only prove they bought a Toyota vehicle: "buying the product in itself is injury-in-fact – and the only 'injury' requiring proof ...." *Id.* at 13.

Nonsense. The Automakers ignore the facts actually alleged in that case, as well as the district court's determinations that the plaintiffs have adequately alleged actual economic harm. After investigation by the National Highway Transportation Safety Administration revealed that "SUA tended to be significantly higher in Toyota vehicles with an ETCS rather than a mechanical throttle system" and "pursuant to a congressional investigation, Toyota disclosed that it had received over 37,900 complaints regarding SUA," after which "the value of Toyota cars diminished." *Order 1*, 754 F. Supp. 2d at 1157, 1158, 1160. Specifically, the plaintiffs detailed how the "Kelley Blue Book and NADA Used Car Guide Values lowered the values of Toyota vehicles subject to recalls." *In re Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 52529, at *94 (C.D. Cal. May 13, 2011) ("*Order 2*"). Moreover, even after recalls, "incidents of SUA persisted." *Order 1*, 754 F. Supp. 2d at 1158.[4]

---

4. The Automakers protest that the plaintiff class includes buyers whose vehicles were recalled and retrofitted. Automakers

The district court reasoned that, to have Article III standing, plaintiffs alleging actual economic loss need not also have actually experienced the terror of being stuck in a runaway vehicle, property damage, personal injury, or death. *Id.* at 1161. The court instead found that the plaintiffs had alleged that "every Toyota vehicle with ETCS is defective and has a statistically significant propensity for SUA." *Id.* at 1162; *see also Order 2*, 2011 U.S. Dist. LEXIS 52529, at *93-94 (summarizing allegations of lack-of-brake-override defect). And it found that the plaintiffs had adequately alleged injury-in-fact, because "defective cars are simply not worth as much." *Id.* at *108. Specifically, plaintiffs who "contracted for safe vehicles that start and stop upon proper application of the accelerator and brake pedals" but "received defective vehicles subject to dangerous SUA events, meaning that Plaintiffs' vehicles sometimes do not start and stop as promised," suffered economic loss at the time of purchase. *Order 1*, 754 F. Supp. 2d at 1165; *see also Order 2*, 2011 U.S. Dist. LEXIS 52529, at *113-14. In short, the court found that allegations of "overpayment for the defective, unsafe vehicle constitute[d] the economic-loss injury that is sufficient to confer standing." *Id.* at *119 (denying motion to dismiss for lack of Article III standing).

Further, circuit courts agree that in such cases, where plaintiffs plead actual economic injury, they establish Article III standing without also being required to plead that their vehicles manifested the defect. For example, in *Cole v. GMC*, 484 F.3d 717, 723 (5th Cir. 2007), *cited*

Br. at 7. But the *Toyota* Economic-Loss Plaintiffs adequately allege that the retrofits in question were ineffective. *E.g.*, 2011 U.S. Dist. LEXIS 52529, at *108-09, *113-14.

in Automakers Br. at 17, the court ruled that plaintiffs established Article III standing by allegations of economic injury:

> [Plaintiffs] do assert their own actual economic injuries.... Plaintiffs seek recovery for their actual economic harm (*e.g.*, overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain.... [I]t is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered.

See also Daffin v. Ford Motor Co., 458 F.3d 549, 554 (6th Cir. 2006); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175, 1176 (9th Cir. 2010); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002-03, 1007 (D.C. Cir. 1986) (referring to economic-loss claims). By contrast, courts dismiss claims where plaintiffs cannot plead such injury. *See Briehl v. General Motors Corp.*, 172 F.3d 623, 623, 628-29 (8th Cir. 1999) (finding "conclusory" assertions of injury were "simply too speculative" to state a claim because there were no allegations supporting plaintiffs' claim that their vehicles' resale value had diminished); *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304, 306 (Tex. 2008) (observing that "[a] person who buys a defective product can sue for economic damages, but the law is not well developed on the degree to which the defect must actually manifest itself before it is actionable" (footnote omitted), and dismissing for lack of standing

because injury was too remote where defect rarely manifested).[5]

These cases – where plaintiffs' allegations of economic injury established their Article III standing or helped state a claim – accordingly present very different considerations from the present appeal. Here, of course, the parties agree that RESPA does not require plaintiff Edwards to prove economic or other tangible injury, which became the premise of the question presented. In place of proof of direct injury to support a private plaintiff's Article III standing, Congress substituted a conclusive presumption of injury and unjust-enrichment-based relief in the form of a treble refund. *See* Respondent's Br. at 28-31, 34, 35-36. Edwards did not submit proof of injury for this reason. *See id.* at 36 & n.7.

The Automakers' brief buries these crucial distinctions, revealing itself as a special pleading about a fabricated issue intended to invite the Court to address a far different question than the one on which it granted its writ of *certiorari*.

---

5. The Automakers cite *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018-20 (7th Cir. 2002), in which the circuit court reversed certification of nationwide classes on unmanageability grounds due to application of multiple states' laws. Plaintiffs' standing was not at issue. Plaintiffs apparently had proffered a sufficient showing of injury to satisfy Article III's low bar. The Automakers focus on dicta regarding whether plaintiffs' assertions of financial injury stated a claim under laws of various states, an altogether different concern. Further, the court's musing that the marginal cost of properly designing or manufacturing a defective product limits a defendant's liability, *see id.* at 1017 n.1, is curious given the likelihood that such failure can trigger damages far exceeding that cost, as, for example, the Deepwater Horizon oil spill amply demonstrates.

IV. CONCLUSION

Plainly, the Automakers are unhappy about their potential liability to customers for economic losses when a material defect in an automaker's vehicles, after public revelation, measurably diminishes the vehicles' market value. The Automakers cite decisions affirming such liability, for which they could have sought this Court's review. But this is not such a case. Rather than involving evidence of measurable economic losses, here there is no evidence of harm at all. Instead, according to Respondent, there is a long-standing, narrowly applied presumption of injury that Congress invoked for private RESPA claims – a presumption that has no place in defective-vehicle economic-loss cases.

Nonetheless, exploiting an opportunity created by the parties' blanket consent to all *amicus curiae* briefs, the Automakers submit a brief addressing issues that stray far from the actual question presented. The Automakers' question and their arguments have no place here. The *Toyota* Economic-Loss Plaintiffs respectfully submit that the Court should address the question presented and not the Automakers' remote, unripe alternative.

Dated: October 18, 2011

Respectfully submitted,

STEVE W. BERMAN
Counsel of Record
ERIN K. FLORY
HAGENS BERMAN SOBOL
SHAPIRO LLP
1918 Eighth Avenue,
Suite 3300
Seattle, WA 98101
(206) 268-9320
steve@hbsslaw.com

MARC M. SELTZER
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars,
Suite 950
Los Angeles, CA 90067
(310) 789-3102

FRANK M. PITRE
COTCHETT, PITRE
& MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF TRUST LAW AND ERISA LAW PROFESSORS IN SUPPORT OF RESPONDENT

MELANIE B. LESLIE
Counsel of Record
Benjamin N. Cardozo School of Law, Yeshiva University
55 Fifth Avenue, Suite 503
New York, NY 10003
(212) 790-0266
Leslie@yu.edu
October 18, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library
Law

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. A TRUST BENEFICIARY HAS STANDING TO SUE A TRUSTEE WHO HAS ENGAGED IN A SELF-DEALING TRANSACTION EVEN WHEN THE BENEFICIARY HAS SUFFERED NO PECUNIARY DAMAGES AS A RESULT OF THE TRANSACTION. 5

A. The Duty of Loyalty and the No-Further-Inquiry Rule 5

B. The Logic of the No-Further-Inquiry Rule 9

II. FEDERAL COURTS, INCLUDING THE SUPREME COURT, HAVE ROUTINELY ADJUDICATED CLAIMS INVOKING THE NO-FURTHER-INQUIRY RULE WITHOUT RAISING ARTICLE III AS A BAR. 13

A. This Court and lower federal courts have long recognized that violation of

a principal's right to unbiased management by a fiduciary constitutes an injury for Article III purposes. 15

B. Federal courts have jurisdiction to adjudicate ERISA claims when a plan participant establishes that a fiduciary has violated plaintiff's statutory rights, even when that plaintiff cannot prove pecuniary injury. 21

1. ERISA embraces the logic of the no-further-inquiry rule. 21

2. Federal courts recognize that a plaintiff who seeks disgorgement of profits from a plan fiduciary who has violated its duty of loyalty has standing even if plaintiff has suffered no pecuniary injury. 25

3. The cases cited by Petitioners *support* rather than undermine the proposition that violation of a statutory right to an unconflicted fiduciary is an "injury" for Article III purposes. 26

III. IN AWARDING A CUSTOMER RECOVERY OF TRIPLE THE PURCHASE PRICE UPON A SHOWING THAT THE PROFESSIONAL RECEIVED A KICKBACK OR "THING OF VALUE" IN

EXCHANGE FOR A REFERRAL, RESPA IS CONSISTENT WITH THE LOGIC OF THE NO-FURTHER-INQUIRY RULE. 31

TABLE OF AUTHORITIES

Page(s)

CASES

Appeal of Baker, 13 A.2d 487 (1888) 8

Arst v. Stifel, Nicolaus & Co., 954 F. Supp. 1483 (D. Kan. 1997) 13, 20

Banes Estate, 305 A.2d 723 (1973) 8

Chao v. Hall Holding Co., 285 F.3d 415 (6th Cir. 2002) 26

Chao v. Linder, No. 05-3812, 2007 WL 1655254 (N.D. Ill. May 31, 2007) 25, 26

Crenshaw v. Swenson, 611 S.W.2d 886 (Tex. Civ. App. 1980) 18

Cutaiar v. Marshall, 590 F.2d 523 (3d Cir. 1979) 23, 24, 26

Daniel v. Aon Corp., No. 99-11893, 2003 WL 25711532 (Ill. Cir. Nov. 4, 2003) 13

Davoue v. *Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816) 6

Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983) 23

Fisher v. Miocene Oil and Gas Ltd., 335 Fed. App'x. 483 (5th Cir. 2009) 17, 18

FMC Corp. v. Boesky, 852 F.2d 981 (7th Cir. 1988) 14

Foster Poultry Farms, Inc. v. SunTrust Bank, 377 Fed. App'x. 665 (9th Cir. 2010) 21

Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629 (D. Wis. 1979) 24

Gilliam v. Edwards, 492 F. Supp. 1255 (D.N.J. 1980) 26

Glanton v. AdvancePCS Inc., 465 F.3d 1123 (9th Cir. 2006) 28

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 27, 29

Hendry v. Pelland, 73 F.3d 397 (D.C. 1996) ... 13, 18, 19, 20

Herman v. S. Carolina Nat'l Bank, 140 F.3d 1413 (11th Cir. 1998) 25

Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450 (3d. Cir. 2003) 28, 29, 30

Huber v. Taylor, 469 F.3d 67 (3d Cir. 2006) 20

In Re Paxson Trust I, 893 A.2d 99 (Sup. Ct. Pa. 2006) 8

Jackson v. Smith, 254 U.S. 586 (1921) 16, 17

Kendall v. Emps. Ret. Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 28

Loren v. Blue Cross & Blue Shield of Michigan, 505 F.3d 598 (6th Cir. 2007) 28, 29

Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209 (2d. Cir. 1987) 22, 24, 26

Marshall v. Kelly, 465 F. Supp. 341 (W.D. Okl. 1979) 24, 26

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 22, 24

Massara v. Henery, No. 19646, 2000 Ohio App. LEXIS 5425 (Ohio Ct. App. Nov. 22, 2000) 12

McCullough v. AEGON USA, Inc., 585 F.3d 1082 (8th Cir. 2009) 29

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 25

Michoud v. Girod, 45 U.S. 503, 557 (1846) 15

Patelco Credit Union v. Sahni, 262 F.3d 897 (9th Cir. 2001) 24

Reich v. Valley Nat'l Bank of Arizona, 837 F. Supp. 1259 (S.D.N.Y. 1993) 26

Robertson v. Chapman, 152 U.S. 673 (1894) ... 15, 16

Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942) 9

United States v. Carter, 217 U.S. 286 (1910)..... 17

Varity Corp. v. Howe, 516 U.S. 489 (1996) 22, 27

Warehime v. Warehime, 761 A.2d 1138 (Pa. 2000) 12

Weil v. Neary, 278 U.S. 160 (1929)..... 17, 20

Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262 (1941) 17, 20

STATUTES

S. Rep. 383, 93d Cong., 1st Sess. 32 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4917 22

S. Rep. No. 93-866, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547..... 31

OTHER AUTHORITIES

Austin W. Scott, *Participation In a Breach of Trust*, 34 Harv. L. Rev. 454, 455 (1921) 9

G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (2d 1993) 6, 7, 9, 11

John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 931-32 (2005)..... 11

Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010)..... 6, 7

Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 559 (2005) ..... passim

Restatement (Third) of Trusts (2007). 6, 7, 9, 11, 12

Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 680 (2004) 10

Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573 (2003) 6, 11

U.S. Gov't Accountability Off., *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* (Apr. 2007) 31, 32

Unif. Trust Code § 1002 (amended 2005) 7, 12

STATEMENT OF INTEREST

Amici and counsel are a group of law professors who teach, study, and write about trust law.[1] Among the group are law professors who are co-authors of leading casebooks and treatises in the field of Trusts and Estates. *Amici* include:

Julia Belian, University of Detroit Mercy School of Law School
Gerry W. Beyer, Texas Tech University School of Law
Ira Bloom, Albany Law School
Karen Box, University of Washington School of Law
Bridget Crawford, Pace University Law School
Laura Cunningham, Benjamin N. Cardozo Law School, Yeshiva University
Robert T. Danforth, Washington and Lee University School of Law
Joel Dobris, U.C. Davis School of Law
John K. Eason, Seattle University School of Law
Lynn Foster, William H. Bowen School of Law, University of Arkansas at Little Rock
Iris Goodwin, University of Tennessee College of Law

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Deborah S. Gordon, Drexel University, Earle Mack School of Law
Kenneth Joyce, University at Buffalo Law School
James R. Repetti, Boston College of Law
Laura Rosenbury, Washington University Law
Jeffrey Stake, Indiana University School of Law, Bloomington
Stewart E. Sterk, Benjamin N. Cardozo Law School, Yeshiva University
Joshua Tate, Southern Methodist University, Dedman School of Law
Edward Zelinsky, Benjamin N. Cardozo Law School, Yeshiva University

SUMMARY OF ARGUMENT

I. Petitioners argue that even if First American's obligation to refrain from making payments in exchange for referrals can be characterized as a duty of loyalty, Respondent has no standing to hold First American accountable for violating that duty because "the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm." This statement misunderstands both Respondent's claim and the law. For centuries, the law has recognized that a trust beneficiary has standing to sue its trustee for breach of the fiduciary duty of loyalty even if that beneficiary does not claim that the trustee's self-dealing caused pecuniary damage to the trust. Under the no-further-inquiry rule, all a beneficiary needs to establish is that the trustee engaged in unauthorized self-dealing or acted under a conflict of interest. In the face of such a showing, the court may award disgorgement of profits, removal of the fiduciary, or other relief.

The no-further-inquiry rule thus gives a beneficiary a "right" to a conflict-free fiduciary. When a beneficiary is deprived of that right, the injury suffered is not "abstract," but very real. The beneficiary has been denied what was promised; a fiduciary who would advance the beneficiary's best interest and not its own.

II. This Court has adjudicated cases involving the no-further-inquiry rule since at least the mid-nineteenth century. Never has it suggested that it might lack jurisdiction over such a case because a

plaintiff could not or did not prove that the agent's act of self-dealing caused pecuniary injury. Instead, this Court has rightfully assumed that the very act of an agent's self-dealing causes injury to the principal. Courts of Appeal and District Courts are in accord.

ERISA's structure adopts the logic of the no-further-inquiry rule, imposing *per se* liability and equitable remedies when fiduciaries violate their duty of loyalty.

III. In awarding the consumer the equitable remedy of disgorgement of triple the purchase price, RESPA adopts the logic of the no-further-inquiry rule. Congress recognized that the relationships between home purchasers and real estate professionals are characterized by information asymmetries and power imbalances, and that payments for referrals prevent meaningful market competition. For that reason, Congress sought to create a strong deterrent to undisclosed self-dealing and conflict-of-interest transactions. Accordingly, RESPA penalizes real estate professionals who give or take kickbacks upon a simple showing that a kickback occurred. Like trust law, the statute allows the consumer to seek recovery from both agents and those who knowingly profit from tainted transactions. By adopting a trust-law construct, the statute grants consumers a right to untainted transactions. Accordingly, a violation of that statutorily-granted right must be understood as satisfying Article III's injury requirement.

ARGUMENT

I. A TRUST BENEFICIARY HAS STANDING TO SUE A TRUSTEE WHO HAS ENGAGED IN A SELF-DEALING TRANSACTION EVEN WHEN THE BENEFICIARY HAS SUFFERED NO PECUNIARY DAMAGES AS A RESULT OF THE TRANSACTION

A. The Duty of Loyalty and the No-Further-Inquiry Rule.

Petitioners argue that even if First American's obligation to refrain from making payments in exchange for referrals can be characterized as a duty of loyalty, they should not be held liable for breaching that duty because "the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm." (Pet'rs' Br. at 15.) This description of legal doctrine is wrong for two reasons: it states that one cannot sue for breach of the duty of loyalty absent proof of pecuniary injury, and it suggests that courts view self-dealing transactions that cause no pecuniary damage as creating an "abstract" -- as opposed to a very real -- injury. For centuries, trust law has provided that a beneficiary may sue his or her trustee for breach of the duty of loyalty even if the beneficiary has suffered no pecuniary injury as a result of the trustee's disloyal act.

The "no-further-inquiry" rule holds that a

trustee is *per se* in breach of its fiduciary duty if he or she engaged in self-dealing without advance approval. *See* Restatement (Third) of Trusts § 78 cmt. b (stating that under the no-further-inquiry rule "it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573 (2003) ("Under the no-further-inquiry rule, even if the self-dealing transaction is objectively fair, the beneficiaries need only show the existence of the trustee's self-interest in order to prevail. Once the beneficiaries prove the fact of self-dealing, there is 'no further inquiry' and the transaction is voided."); Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 17.2 (5th ed. 2010) (hereinafter "Scott and Ascher") ("[A] trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach has resulted in any actual benefit to the trustee . . . [or] whether the breach has caused any actual harm to either the trust or its beneficiaries."); *Davoue v. Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816) (allowing a devisee to sue an executor for selling to executor's wife, despite fact that the sale occurred at a public auction and brought a fair price); *see also*, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 543 (2d 1993) (hereinafter "Bogert & Bogert"). If a trustee genuinely believes that a transaction involving self-dealing or conflict of interest in is

the best interest of the trust beneficiaries, it must provide full disclosure and obtain advance approval for the transaction from a court or the trust beneficiaries. *See* Restatement (Third) of Trusts § 78 cmt. c(1); *see also* Bogert & Bogert § 543. Courts construe claims of advance approval strictly, against the trustee. *Id.*

On a showing that an unapproved conflict existed, a beneficiary may sue to rescind the transaction, recover damages, if any, or demand disgorgement of profits or other equitable relief. *See* Bogert & Bogert § 861; *see also* Unif. Trust Code § 1002 (amended 2005). In providing for disgorgement of profits in the absence of pecuniary injury, the no-further-inquiry rule defines the trustee's act of self-dealing as an injury in itself. Put differently, the essence of the trust arrangement is the trustee's promise to place the beneficiaries' best interests ahead of the trustee's personal interests. *See* Scott and Ascher § 17.2 ("The duty of loyalty is . . . the fruit of the courts' efforts to regulate behavior of trustees when their duties as trustee require them to act in ways that may or do conflict with their own personal interests."); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 559 (2005) (arguing "trustees hold themselves out as being trustworthy; that is the essence of the service they offer"). When a trustee operates against the backdrop of an undisclosed conflict of interest, the beneficiaries are deprived of what was promised: a fiduciary who would zealously

act for their best interests. In considering its own interests, the trustee captured some of the value of the transaction for itself.

For example, in *In Re Paxson Trust I*, 893 A.2d 99 (Sup. Ct. Pa. 2006), the husband/wife, who were both trustees and life beneficiaries of a trust created by the wife's father, repeatedly used the trust property as collateral for loans to finance the purchase of property to which they took title in their individual names. When their children, the remainder beneficiaries, sued them for breach of the duty of loyalty, the trustees countered that they should incur no liability because their actions had not harmed the trust. The trial court agreed, but the appellate court reversed, citing a case from 1888 to hold that the trustees were required to disgorge to the children all profits made from resale of the properties. *Id.* at 122 (citing *Appeal of Baker*, 13 A.2d 487, 494-95 (1888)). In so holding, the court emphasized that "'it matters not that there was no fraud meditated and no injury done; *the rule [forbidding self-dealing] is not intended to be remedial of actual wrong, but preventive of the possibility of it.*'" *Id.* at 120 (emphasis in original) (quoting *Banes Estate*, 305 A.2d 723, 727 (1973)).

Finally, in order to provide maximum protection for the vulnerable beneficiary, trust law has long provided that a court has the authority to order a non-fiduciary third party who knowingly participates in a trustee's self-dealing transaction to disgorge profits to the injured beneficiary. *See*

Bogert & Bogert § 701. Professor Scott acknowledged that the rule existed "as far back as 1465." *See* Austin W. Scott, *Participation In a Breach of Trust*, 34 Harv. L. Rev. 454, 455 (1921). Such a party "is a participant in the breach of trust and liable therefore to the beneficiary." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

B. The Logic of the No-Further-Inquiry Rule.

The no-further-inquiry rule has endured because it compensates for problems inherent in the trustee-beneficiary relationship. First, trust beneficiaries are in a poor position to discover trustee conflicts of interest. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 559 (2005). To determine whether the trustee is profiting from its position of trust, the beneficiary must know the nature and extent of the trustee's interests and corporate relationships, information that is not often readily available. Unless the trustee volunteers this information, it can be difficult or impossible to figure out. *Id.* The no-further-inquiry rule compensates for underdeterrence by penalizing a trustee for self-dealing unless he fully discloses it and obtains advance approval.

Second, even if the beneficiary detects a conflict, he or she may have difficulty evaluating whether the deal is in her best interests. *See* Restatement

(Third) of Trusts § 78 cmt. b (recognizing that beneficiaries' attempts to monitor trustee performance are likely to be "inefficient if not ineffective" because monitoring efforts will be "wastefully expensive" and will suffer from a lack of information, resources, and necessary knowledge and experience); *see also* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 Cornell L. Rev. 621, 680 (2004) (arguing that relying on liability rules is problematic because "beneficiaries are often unsuited to monitor the trustee . . . because they are unborn, incapacitated, or simply irresponsible"). To monitor the fairness of a deal made by the trustee, the beneficiary must engage in a comparative analysis of other options, an activity that the beneficiary may lack the sophistication to undertake. Among other issues, the beneficiary must determine whether the transaction is necessary and whether the trustee could have engaged in the same transaction on terms more favorable to the trust. In short, to evaluate the transaction adequately, the beneficiary would have to possess the same knowledge of the market and level of financial and business sophistication that the trustee enjoys. This would defeat the purpose of the principal-agent relationship.

Third, it is difficult for a court to determine after the fact whether the terms of the deal advance the beneficiaries' best interests; the market is a better indicator of fair market value than an *ex post* judgment by the court. Although courts have some experience making judgments about market value, they are less able to make *ex*

post evaluations about whether the services the trustee contracted for were necessary in the first place, and whether the services could better have been performed by someone else. *See* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 546 (2005).

The no-further-inquiry rule's bright-line prohibition on self-dealing without advance approval and the severe remedy it authorizes (disgorgement of all profits, even if the trust was not harmed) create the strongest possible disincentives to self-dealing. *See* Restatement (Third) of Trusts § 78 cmt. b (holding that "in transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee"); Bogert & Bogert § 543; John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 931-32 (2005); Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. Corp. L. 565, 573-74 (2003).

In recent years, academics, policy makers and courts have questioned the extent to which the no-further-inquiry rule should continue to be applied to self-dealing by a private trustee. *See* John Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 Yale L.J. 929, 989-90 (2005) (arguing that the rule

should be replaced by the corporate law rule, which presumes liability for self-dealing but allows a fiduciary to rebut the presumption by showing that the self-dealing transaction was fair); *see also* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 544-46 (2005) (defending the no-further-inquiry rule because it best compensates for poor monitoring by forcing advance disclosure and defense of self-dealing transactions). Banks have successfully lobbied for legislation exempting certain types of transactions from the rule's grasp. Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 Wm. & Mary L. Rev. 541, 575 n.159. Courts occasionally relax the rule when family member trustees acting in good faith unknowingly violate its advance approval requirement. *See, e.g., Massara v. Henery*, No. 19646, 2000 Ohio App. LEXIS 5425 (Ohio Ct. App. Nov. 22, 2000) (holding that the no-further-inquiry rule was inapplicable and placing the burden on the beneficiary to show that he was damaged by the trustee's action); *Warehime v. Warehime*, 761 A.2d 1138 (Pa. 2000) (holding that the appellate court erred as a matter of law in applying the no-further-inquiry rule because a "good faith" standard was more appropriate). *But see* Restatement (Third) of Trusts § 78 cmt. b (2007) (reaffirming the no-further-inquiry rule); Unif. Trust Code § 1002 (amended 2005) (same).

Nonetheless, one thing remains constant – there is complete agreement on what the no-further-inquiry rule is and has been for hundreds of years.

No one – not one scholar, commentator, or court – has suggested that the rule's imposition of liability upon a simple showing of conflict creates a Constitutional standing question.

II. FEDERAL COURTS, INCLUDING THE SUPREME COURT, HAVE ROUTINELY ADJUDICATED CLAIMS INVOKING THE NO-FURTHER-INQUIRY RULE WITHOUT RAISING ARTICLE III AS A BAR

The no-further-inquiry rule is not limited to trust law – state courts and state and federal statutes have extended the rule's "strict liability" approach to a variety of relationships characterized by power imbalances and information deficits. *See, e.g.*, *Daniel v. Aon Corp.*, No. 99-11893, 2003 WL 25711532, at *11 (Ill. Cir. Nov. 4, 2003) (holding that a customer who sued an insurance broker for taking kickback "need not allege or establish actual damages or harm to proceed with their breach of fiduciary duty claim"); *Arst v. Stifel, Nicolaus & Co.*, 954 F. Supp. 1483, 1493 (D. Kan. 1997) (applying state law rule and ordering corporate fiduciary to disgorge to shareholder profits realized from unauthorized self-dealing transaction, even though plaintiff did not seek or prove damages); *Hendry v. Pelland*, 73 F.3d 397 (D.C. 1996) (stating that a client whose attorney breached his duty of loyalty was not required to prove pecuniary injury under state law, and ordering attorney to disgorge fees).

As this Court has noted, courts are "obliged to examine standing *sua sponte* where standing has erroneously been assumed below." *Adarand Constructors Inc., v. Mineta,* 534 U.S. 103, 110 (2001). Yet when an agent transacts under a conflict of interest and the no-further-inquiry rule applies, federal courts (including this Court) take for granted that the principal has satisfied Article III's injury requirement. This makes sense. Federal courts understand that a rule imposing *per se* liability upon a showing of conflict creates a common law or statutory right – the right of the principal to an un-conflicted agent – and that violation of that right constitutes an injury. *See, e.g., FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988) (stating that the injury required by Article III may exist solely because state law rights have been infringed, and giving as an example state-law breach-of-fiduciary duty claims that do not require plaintiffs to prove pecuniary injury). To hold otherwise would be to deprive federal courts of the power to adjudicate a wide variety of state and federal law claims based on deterrence-oriented statutes. Courts' and legislatures' ability to create effective rules to deter self-dealing by fiduciaries would be materially frustrated.

A. This Court and lower federal courts have long recognized that violation of a principal's right to unbiased management by a fiduciary constitutes an injury for Article III purposes.

Since at least the mid-nineteenth century, this Court has implicitly recognized that it has jurisdiction to adjudicate a fiduciary duty of loyalty claim involving the no-further-inquiry rule. *See Michoud v. Girod*, 45 U.S. 503, 557 (1846) (applying the no-further-inquiry rule to void a sale tainted by an executor's conflict of interest). For example, in *Robertson v. Chapman*, 152 U.S. 673 (1894), the Court considered whether an attorney had engaged in self-dealing by secretly purchasing the principal's property. In explaining the law to be applied, the Court announced:

> If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and at the election of the latter . . . will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account, not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently

> acquired it, was worth more than he paid for it. *The law will not, in such a case, impose upon the principal the burden of proving that he was in fact injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty.*

Robertson, 152 U.S. at 681 (emphasis added). Although the Court ultimately determined that the attorney had not been on both sides of the transaction, it never entertained the thought that it might lack jurisdiction over the case because the plaintiff did not prove pecuniary injury. It simply assumed, as federal courts have always done, that the agent's violation of the principal's right to unbiased representation would constitute an injury in fact.

Forty years later, this Court again implicitly recognized that an agent invoking the no-further-inquiry rule met Article III's injury requirement. In *Jackson v. Smith*, 254 U.S. 586 (1921), the court held that an agent breached his duty of loyalty by purchasing an interest in the principal's property. In so holding, the Court stated that,

> The course taken was one which a fiduciary could not legally pursue. Since he did pursue it and profits resulted the law made him accountable to the trust estate for all the profits obtained by him and those who were associated with him in the matter, *although the estate may not*

have been injured thereby.

Id. at 588-89 (emphasis added) (citation omitted). At no time did the court suggest that it lacked jurisdiction over the case because the plaintiff did not establish it had suffered pecuniary injury. *See also Weil v. Neary*, 278 U.S. 160, 173 (1929) (assuming it had jurisdiction to void a contract on conflict-of-interest grounds even if the contract benefitted the principal); *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262, 268 (1941) (assuming it had jurisdiction to disallow payment of fees in bankruptcy proceeding where agent had several conflicts of interest even though the transactions caused no unfairness to the estate); *United States v. Carter*, 217 U.S. 286 (1910) (affirming judgment awarding disgorgement of profits gained from contracts tainted by conflicts of interest).

On numerous occasions, lower federal courts have applied state law no-further-inquiry rules to breach of fiduciary duty claims, and have never once suggested that they might lack jurisdiction because plaintiffs did not or could not prove that a fiduciary's self-dealing caused pecuniary injury. For example, in *Fisher v. Miocene Oil and Gas Ltd.*, 335 Fed. App'x. 483 (5th Cir. 2009), a trust beneficiary alleged that her mother, the trustee, had breached her duty of loyalty by selling trust property to the trustee's son and other related parties without the beneficiary's knowledge or consent. The beneficiary did not attempt to prove that the transactions were detrimental to the trust, but simply sued to rescind them. The district court dismissed plaintiff's claim, not on Article III

grounds, but on the mistaken view that state law required plaintiff to establish actual pecuniary injury to be entitled to rescind the transactions. *Id.* at 492-93. The Fifth Circuit reversed, emphasizing that under Texas law "self-dealing transactions may be attacked by the beneficiary *even though he has suffered no damages* and even though the trustee has acted in good faith." *Id.* at 486 (emphasis in original) (quoting *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980)). As the court explained, "a self-dealing transaction itself constitutes an injury *vel non*, the undoing of which is an available remedy." *Fisher*, 335 Fed. App'x. at 487. At no time did the trustee argue or did the court suggest that the beneficiary could not meet Article III's injury requirement. It went without saying that the violation of the beneficiary's state-law right to unbiased trust management constituted an injury in fact.

In *Hendry v. Pelland*, 73 F.3d 397 (D.C. 1996), the court ordered an attorney to disgorge the fees he had earned by representing five members of one family in a breach of contract suit. *See Hendry*, 73 F.3d 397. Although the members of the Hendry family had materially conflicting interests in the suit, at no time did their attorney explain or discuss those conflicts. The court found that the attorney breached his duty of loyalty, and rejected his claim that the Hendrys could recoup fees only if they could establish that they had suffered actual injury as a result of the breach. As the court explained, proof of actual injury would be necessary if the Hendrys sought *compensatory* damages, since those damages "make plaintiffs whole for the

harms that they have suffered as a result of defendants' actions." *Id.* at 402. But because the Hendrys did not seek compensation for actual pecuniary injury they were entitled to disgorgement of legal fees upon a simple showing that the attorney had a conflict of interest.

Petitioners suggest that *Hendry* supports their point, claiming that the court based its decision (and implicitly, its assumption that it had jurisdiction over the case) on a finding that the Hendrys had suffered some sort of pecuniary injury. In support of this reading of the case, Petitioners quote the court as stating that "forfeiture [of attorney's fees charged by a faithless fiduciary] reflects ... the decreased value of the representation itself." (Pet'rs' Br. at 35 n.17 (quoting *Hendry*, 73 F.3d at 402)). Petitioners argue that Edwards was not similarly injured because "she did not claim that she paid First American or Tower City for advice about title insurance or that she did not get what she paid for." (Pet'rs' Br. at 35 n.17.)

But a reading of the court's *full* statement provides clarity; according to the court, "forfeiture reflects ***not the harms clients suffer from the tainted representation***, but the decreased value of the representation itself." *Hendry*, 73 F.3d at 402 (emphasis added). In other words, the court simply re-stated the basic rule: by definition, an agent who self-deals injures the principal, because the *per se* liability rule gives the principal the right to a conflict-free transaction, and self-dealing is a violation of that right. The principal did not get

what it paid for. And as the *Hendry* opinion reminds us, there are good reasons for this approach: it deters fiduciary misconduct, "a goal worth furthering regardless of whether a particular client has been harmed," and prevents fiduciaries from "profit[ing] from their disloyalty." *Id.*

Fisher and Hendry are just two of many federal cases finding "injury" in the very fact of an agent's self-dealing. *See Huber v. Taylor*, 469 F.3d 67 (3d Cir. 2006) (determining that Texas law, which does not require clients to prove damages to obtain disgorgement of attorneys fees when attorney breaches fiduciary duty, applied in diversity case and remanding to district court for order disgorging fees; *Arst*, 954 F. Supp. 1483 (applying state law rule and ordering corporate fiduciary to disgorge profits realized from unauthorized self-dealing transaction, even though plaintiff did not seek or prove damages); *Hendry*, 73 F.3d 397 (stating that client whose attorney breached his duty of loyalty was not required to prove pecuniary injury, and ordering attorney to disgorge fees); *Woods*, 312 U.S. at 268 (1941) (disallowing payment of fees to indenture trustee under Bankruptcy Act because agent had several conflicts of interest even though "fraud or unfairness were not shown to have resulted" because . . . "'[w]hat is struck at in the refusal to enforce contracts of this kind is not only actual evil results but their tendency to evil in other cases'") (quoting *Weil*, 278 U.S. at 173); *Weil*, 278 U.S. at 173-74 (voiding contract between attorneys for division of fees in bankruptcy proceedings on conflict-of-interest grounds, because "even if the ultimate results" of the transaction

"were good," enforcing such contracts would "destroy the safeguards of the law and lessen the prevention of abuses"); *cf. Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 Fed. App'x. 665 (9th Cir. 2010) (awarding claimant disgorgement of profits against bank that breached confidentiality agreement where plaintiff could not prove that breach caused it actual injury).

B. Federal courts have jurisdiction to adjudicate ERISA claims when a plan participant establishes that a fiduciary has violated plaintiff's statutory rights, even when that plaintiff cannot prove pecuniary injury.

In support of its erroneous claim that a plaintiff cannot sue a fiduciary for breach of duty absent a showing of "financial injury," Petitioners cite a handful of ERISA cases that it purports establish that point. (Pet'rs' Br. at 34.) Here, Petitioners misunderstand ERISA law. ERISA embraces the trust law duty of loyalty and the logic of the no-further-inquiry rule. Federal courts considering ERISA claims regularly award equitable relief, such as disgorgement, without suggesting that a plaintiff who cannot prove pecuniary injury lacks standing. When properly read in the context of ERISA as a whole, the cases Petitioners cite *undermine* rather than support their argument.

1. ERISA embraces the logic of the

no-further-inquiry rule.

The legislative history of ERISA demonstrates that the driving force behind the statute was the concern with "'misuse and mismanagement of plan assets', particularly self-dealing by plan managers." *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209 (2d. Cir. 1987) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141 n.8 (1985)). Prior to ERISA, the relationships between pension plans and administrators were governed by the standard applicable to arms-length transactions. S. Rep. No. 383, 93d Cong., 1st Sess. 32 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4917. In recognition of the fact that this standard failed to protect plan beneficiaries from fiduciary self-dealing, ERISA imposes strict fiduciary duties on managers. *Id.*

The fiduciary provisions of ERISA are derived from the common law of trusts. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Because Congress was especially focused on the potential for self-dealing by plan managers, ERISA contains multiple provisions setting forth specific fiduciary duties.[2] ERISA codifies the common law duty of loyalty,

---

[2] To quote, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." *See* § 404(a)(1)(A).

directing that a fiduciary "shall not deal with the assets of the plan in his own interest or for his own account," engage in transactions involving a conflict of interest, or receive any kickbacks in any transaction involving assets of the plan. § 406, 29 U.S.C. § 1106(b). As in trust law, fiduciaries that violate these provisions can be held personally liable for damages, disgorgement, or other equitable remedies, such as removal.

To create the greatest possible deterrent to self-dealing and conflict-of-interest transactions, ERISA goes further than the common law by listing specific types of transactions that are absolutely prohibited. *See* § 406, 29 U.S.C. § 1106. In recognition of the fact that plan participants are exceptionally handicapped in their ability to spot, monitor and evaluate transactions tainted by self-dealing, section 406 provides even greater protection than the no-further-inquiry rule by eliminating the advance approval exception. *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983) (citing *Cutaiar v. Marshall*, 590 F.2d 523, 529 (3d Cir. 1979)). As one court explained,

> This rule both assures protection to plan beneficiaries and provides notice to plan fiduciaries of their obligations. It protects *beneficiaries* by prohibiting transactions tainted by a conflict of interest and thus highly susceptible to self-dealing. It gives notice to fiduciaries that they must either avoid the transactions described in Section 406(b) or cease serving in their

> capacity as fiduciaries, no matter how sincerely they may believe that such transactions will benefit the plan. Such protection of beneficiaries and notice to fiduciaries requires that Section 406(b) be broadly construed, and that liability be imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith."

Lowen, 829 F.2d at 1213 (emphasis added) (citations omitted).

Fiduciaries who engage in prohibited transactions are *per se* liable for their actions, even if those actions were taken in a good faith attempt to benefit the plan. *See, e.g., Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001) (upholding summary judgment of fiduciary breach and requiring no further inquiry beyond that "the undisputed facts established that [defendant] engaged in self-dealing" in administering credit union's ERISA plan). Plaintiffs may hold such fiduciaries liable for damages, if any, or may force disgorgement of profits or seek other equitable relief. *See Massachusetts Mut. Life Ins. Co.*, 473 U.S. 134; *Cutaiar*, 590 F.2d at 530; *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 637 (D. Wis. 1979) (citing *Marshall v. Kelly*, 465 F. Supp. 341, 354 (W.D. Okl. 1979)). Courts have also held that non-fiduciaries who participate in prohibited transactions can be required to disgorge "ill gotten plan assets or profits obtained through participation" in those transactions. *See Herman v. S. Carolina Nat'l Bank*, 140 F.3d 1413, 1421-22

(11th Cir. 1998); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260-61 (1993) (acknowledging that section 502(a)(5) allows plan participants to sue non-fiduciaries for disgorgement of profits obtained through involvement in prohibited transactions). Thus, the statute embraces the logic of the no-further-inquiry rule by granting to plan participants and beneficiaries the right to plan management that is free from the taint of conflict of interest and self-dealing.

2. Federal courts recognize that a plaintiff who seeks disgorgement of profits from a plan fiduciary who has violated its duty of loyalty has standing even if plaintiff has suffered no pecuniary injury.

Cases decided under section 406 provide the best evidence that violation of a federal statutory right constitutes an injury for Article III purposes even absent a showing of pecuniary injury. Courts adjudicating prohibited transaction claims understand that section 406 gives plan participants a right to plan management that is free from certain types of conflicts of interests, and that fiduciaries who engage in such transactions cause injury to plans and to plan participants. For example, in *Chao v. Linder*, No. 05-3812, 2007 WL 1655254 (N.D. Ill. May 31, 2007), the court determined that defendants should be held liable for engaging in a prohibited transaction, rejecting their argument that they could not be held liable unless the plaintiff could establish that the

transactions caused harm to the plan:

> We do not agree that harm to the plan must be shown. The *per se* nature of the § 406 prohibitions cuts against the need-to-show harm to the plan. "Even in the absence of bad faith, or in the presence of a fair and reasonable transaction, [§ 406(b)] establishes a blanket prohibition of certain acts, easily applied, in order to facilitate Congress' remedial interest in protecting employee benefit plans.

Id., at *8 (quoting *Lowen*, 635 F. Supp. at 1553, *quoting Gilliam v. Edwards*, 492 F. Supp. 1255, 1263 (D.N.J. 1980)). It is critical to note that the court did not suggest that it lacked jurisdiction to adjudicate the section 406 claims because plaintiff could not show pecuniary injury.

In fact, not one court adjudicating a prohibited transaction claim has suggested that the fact that the plaintiffs could not establish that the prohibited transaction resulted in pecuniary injury raised Article III concerns. *See, e.g., Chao v. Hall Holding Co.*, 285 F.3d 415, 439 (6th Cir. 2002); *Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1259 (S.D.N.Y. 1993); *Marshall*, 465 F. Supp. 341; *Cutaiar*, 590 F.2d 523.

3. The cases cited by Petitioners *support* rather than undermine the proposition that violation of a statutory right to an unconflicted

fiduciary is an "injury" for Article III purposes.

Petitioners cite a few ERISA cases for the proposition that plaintiffs cannot maintain suit for breach of fiduciary duty unless they can show pecuniary injury. But the cases Petitioners cite undermine, rather than support, Petitioners' argument.

To the extent that Petitioners' ERISA cases deny standing for particular claims, they do so for reasons irrelevant here. ERISA grants plan participants, among others, various rights to enforce fiduciary duties. Section 502(a). Under section 502(a)(2), plan participants and others may bring what are essentially derivative suits on behalf of the plan – suits claiming breaches of duties owed to the plan. Plaintiffs may sue on behalf of the plan to recover damages caused by breach of fiduciary duty, and for other equitable relief. Section 502(a)(3), by contrast, authorizes a participant, beneficiary or fiduciary to bring suit *in an individual capacity* to redress violations, enforce provisions of ERISA or the plan terms, or to obtain "other appropriate equitable relief." *See* 502(a)(3). This Court has held that plaintiffs suing under 502(a)(3) are limited to equitable relief and cannot recover individual pecuniary damages. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Varity Corp.* 516 U.S. 489, 509-514.

Taken together, the portions of the cases that Petitioners cite establish two propositions: first, when a plaintiff brings a derivative suit seeking to

recover damages on behalf of the plan under 502(a)(2), plaintiff must allege he has suffered pecuniary injury as a result of the breach of duty owed to the plan.[3] Second, a plaintiff cannot get around 502(a)(3)'s failure to provide for a damages remedy to individual plan participants by dressing up damages claims as "restitution or disgorgement."[4] Neither of these propositions has

---

[3] *See Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112,122 (2d Cir. 2009) (denying standing for plaintiff's (a)(2) and (a)(3) because plaintiff's claim of injury was premised on the speculation that she would receive more in benefits if the plan conformed to ERISA. To the extent that the opinion suggests that a plan participant must show pecuniary injury to be entitled to equitable relief, the case is in error, and is, of course, not binding on this Court); *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598 (6th Cir. 2007) (no standing to the extent plaintiffs sought restitution of funds on the theory that a fiduciary charged their employers too much for hospital services, which caused their employers to demand higher deductibles, co-payments, and/or contributions from participants); *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006) (holding that where plaintiffs claimed that a fiduciary charged their plan too much for prescription drugs, which increased their co-payments and contributions, there was no redressability – and thus no standing – because plaintiffs could not show that those payments and contributions might decrease if the lawsuit were successful).

[4] In *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, (3d. Cir. 2003), the court dismissed plaintiff's claim for "restitution and/or disgorgement of the amount she and other members of the putative class allegedly overpaid as a result of Keystone's failure to disclose ... information." Although plaintiff characterized her claim as one seeking "disgorgement or restitution" -- apparently to get around the fact that ERISA § 502(a)(3) entitled her only to equitable

(footnote continued...)

any relevance to this case. The question before the Court has nothing to do with plaintiffs who seek compensatory damages based on a breach of duty owed to another entity.

Two of the principal cases Petitioners cite actually support the Respondent's argument in this case. For example, in *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 610 (6th Cir. 2007) the plaintiff sought both damages for the

---

(continued from previous page)
relief -- her calculation of the amount owed was a classic compensatory damages calculation: she sought the difference between "the value of the plan as she perceived it (*i.e.*, without a physician incentive structure) and the value of the plan as actually configured (*i.e.*, with physician incentives)." *Id.* at 453. In other words, she sought to be compensated for losses caused by the fiduciary's breach of fiduciary duties. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 210 (noting "[a]lmost invariably ... suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty") (internal citation omitted). But, as the court pointed out, she could not prove that the plan would have paid less for benefits had the physician incentive structure been disclosed, nor could she establish that her employer would have passed any such savings on to its employees. *Id.* at 214; *cf.*, *McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1084 (8th Cir. 2009) (declining to address standing issue, and following precedent to hold that ERISA § 1132(a)(2) "does not permit a participant in a defined-benefit plan to bring suit claiming liability under § 1109 for alleged breaches of fiduciary duties when the plan is overfunded") (citations omitted).

plan under section 502(a)(2) and injunctive relief for her own benefit under section 502(a)(3). Although the court found that she lacked standing to bring a claim for damages for the plan, it did find that she had standing to pursue her claim for injunctive relief for herself, stating:

> Plaintiffs need not demonstrate individualized injury to proceed with their claims for injunctive relief under § [502](a)(3); they may allege only violation of the fiduciary duty owed to them as a participant in and beneficiary of their respective ERISA plans. Plaintiffs claim that BCBSM breached its fiduciary duty with respect to the Ford and Axle plans to which Plaintiffs belong. This is sufficient to establish injury-in-fact for purposes of constitutional standing under § 1132(a)(3).

Id. at 610. And in *Horvath*, 333 F.3d 450, the court held that plaintiff met the requirements of Article III to the extent she sought injunctive relief for herself, because ERISA creates a statutory right to full disclosure of certain plan documents and failure to provide those documents constitutes an injury, even absent a showing of individual harm. *Id.* at 456. *Horvath* and *Loren* are consistent with other ERISA cases in establishing that when a federal statute grants a statutory right, violation of that right is an "injury" for Article III purposes.

III. IN AWARDING A CUSTOMER RECOVERY OF TRIPLE THE PURCHASE PRICE UPON A SHOWING THAT THE PROFESSIONAL RECEIVED A KICKBACK OR "THING OF VALUE" IN EXCHANGE FOR A REFERRAL, RESPA IS CONSISTENT WITH THE LOGIC OF THE NO-FURTHER-INQUIRY RULE

The purchaser of settlement services is poorly situated to identify and evaluate the market for services. S. Rep. No. 93-866, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547. For that reason, the purchaser depends on real estate professionals to provide full information about the availability and quality of market place alternatives. *See id.* Accordingly, if the professionals on whom the purchaser relies are acting pursuant to undisclosed conflicts of interest, the purchaser, similar to the trust beneficiary, will be unable to detect it or evaluate how the conflict might affect the transaction. *See generally* U.S. Gov't Accountability Off., *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers* (Apr. 2007). Even when the price of a good or service is regulated, the purchaser will have difficulty comparing the service record and product quality of competing companies. *Id.* And when professionals operate pursuant to hidden referral agreements, they deprive the purchaser of the protection that market forces might provide. S. Rep. No. 93-866, at 1. If, as the American Land Title Association admits, exclusivity agreements in exchange for equity investments are truly the norm in the title

insurance industry (Pet'rs' Br. at 7), the effect is to eliminate robust and efficient market competition. *See* U.S. Gov't Accountability Off., *Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*. Because purchasers are generally unaware of these arrangements they may not even realize that they have been deprived of the protection that the market place would ordinarily provide. *Id.*

RESPA compensates for these difficulties just as trust law does: by granting the purchaser the right to demand compensation upon a simple showing that the broker or company engaged in self-dealing, here defined as accepting or paying a kickback in exchange for a referral. 12 U.S.C. § 2607(a), (d). It allows the consumer to seek damages from the agent or from other parties who profited from the conflicted deal. It grants the consumer a statutory right to a transaction free from conflicts of interest. Like the no-further-inquiry rule, the statute defines a violation of that right as an "injury" to ensure compensation for hard-to-detect injuries and create a strong deterrent to self-dealing. *Id.*

Respectfully submitted,

MELANIE B. LESLIE
Counsel of Record
Benjamin N. Cardozo School of Law
Yeshiva University
55 Fifth Avenue, Suite 503
New York, NY 10003
(212) 790-0266
Leslie@yu.edu